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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: May 24, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000576-WC

RONNIE JOHNSON — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-001958-WC
WORKERS' COMPENSATION NO. 03-02514

CHERNE CONTRACTING COMPANY,
WORKERS' COMPENSATION BOARD AND
HON. LAWRENCE F. SMITH, ADMINISTRATIVE
LAW JUDGE — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) awarded temporary total disability (TTD) benefits and a period of medical benefits after finding that the claimant's work-related injury caused a blister on his foot, but his unreasonable failure to follow the podiatrist's treatment plan caused the subsequent infection, partial amputation of the foot, and permanent impairment rating. The Workers' Compensation Board (Board) and the Court of Appeals affirmed, and the claimant appeals. Having concluded that the findings of fact were both adequate and reasonable and that the legal conclusions under KRS 342.035(3) were correct, we affirm.

The claimant was born in 1954 and completed the fifth grade. He had a history of insulin-dependent diabetes since childhood. Records from the Powell County Clinic

indicated that he sought treatment in April, 2003, for numbness and tingling in his feet. They also indicated that he had a peeling fungal callus on the ball of his left foot; that his foot care was poor; and that a podiatry referral was scheduled for June 5, 2003.

The claimant testified that he began working for the defendant-employer in June, 2003, as a construction laborer, and that he informed the company of his diabetic condition. On July 10, 2003, he sprained his left ankle while working. He reported the injury to the safety manager, Tammy Look, who examined his ankle and applied ice packs. He testified that the injury caused him to limp badly and shift his weight to the ball of his foot when he walked. On the third day after the injury, he noticed that a blister had developed at the base of his left big toe and showed it to Ms. Look. Although he obtained medical treatment, the blister became infected and resulted eventually in the amputation of the toe and a portion of his foot.

Ms. Look testified that the claimant limped severely when he came into the office for some equipment on July 10, 2003. Asked what had happened, he reported that he had sprained his ankle. She took off his boots and examined his ankles. Although she noticed no swelling, she put an ice pack on the left ankle and prepared an incident report. Three days later, he asked her to look at a blister on his left foot. Although she thought that it looked like an old wound that had been reopened, she acknowledged that she had not noticed it previously and testified that she drove him to see Dr. Gallenstein.

Notes from the Powell County Clinic, dated July 14, 2003, indicated that the claimant sought treatment for a blister that developed after he injured his ankle. Treatment notes from July 28, 2003, indicated that he had not seen the endocrinologist. He stated on August 6, 2003, that he was not taking his diabetes medication because

he could not afford it and was informed that failing to do so affected his ability to heal.

Dr. Gallenstein also saw the claimant on July 14, 2003. He diagnosed cellulitis of the left foot, an ankle sprain, and poorly-controlled diabetes. He noted that the claimant had not begun taking the antibiotics that were prescribed for the infected blister, urged him to do so immediately, and advised him of the significant danger that the wound posed. After treating the claimant for several days, Dr. Gallenstein referred him to Dr. Pawsat, a board-certified specialist in podiatry.

Dr. Pawsat testified subsequently that the claimant's diabetic condition affected the development of the wound and made it more difficult to heal. He first saw the claimant on July 18, 2003, at which time he diagnosed cellulitis and an abscess on the left foot. He hospitalized the claimant in order to administer intravenous antibiotics and debride the wound. On July 21, 2003, he released the claimant with instructions to stay off his foot completely and to stop smoking in order to help the wound to heal. Yet, when the claimant presented for a follow-up appointment on August 5, 2003, he was walking on his left foot and had not reduced the amount that he smoked. Dr. Pawsat stated that he emphasized the importance of putting absolutely no pressure on the foot. He explained to the claimant that it would be virtually impossible for the wound to heal if he continued to walk on the foot and that it would increase the likelihood of surgery and possibly amputation. Nonetheless, on August 26, 2003, the claimant walked on the foot and wore a closed-toe shoe to his appointment. Again, Dr. Pawsat instructed him not to put weight on the foot.

The wound continued to deteriorate, and on September 12, 2003, Dr. Pawsat amputated the left big toe and a portion of the first metatarsal. At a visit 2 ½ weeks after the surgery, Dr. Pawsat noted that the claimant had been "very noncompliant" and

continued to walk on the foot and to smoke. He emphasized the importance of staying off the foot yet again; however, the claimant presented for treatment on November 10, 2003, bearing his full weight on the foot. Again, Dr. Pawsat stressed the importance of placing no weight on the foot until it healed completely.

Dr. Pawsat assigned permanent impairment ratings of 8% for the amputation and 20% for a secondary gait derangement due to the amputation and diabetic neuropathy. In his opinion, the claimant no longer retained the physical capacity to perform construction work. He should not spend more than two hours per day on his feet in order to avoid the risk of additional complications.

The claimant submitted a report from Dr. Lause´, another podiatrist who treated him after the surgery. Dr. Lause´ stated that the ankle sprain probably caused an alteration in the claimant's gait, resulting in the blister. Since the amputation, he had also developed Charcot's fracture/dislocation of the mid-foot and should not perform work that required him to stand or walk due to the high risk of further complications.

Dr. Pursley, a board-certified neurologist, performed an independent medical evaluation for the employer in April, 2004. He examined the claimant and reviewed medical records from the Powell County Clinic, Dr. Gallenstein, Dr. Pawsat, and the Meadowview Regional Medical Center, where Dr. Pawsat performed the two surgical procedures. Dr. Pursley noted that limping after the ankle sprain was one of several plausible ways in which the blister could have developed, but he did not consider it probable that the ankle injury caused the blister or subsequent infection. He explained that diabetes increases the likelihood of developing blisters and foot infections; that medical records documented such conditions before the injury; and that the claimant did not see the podiatrist to whom he was referred on June 5, 2003. In Dr. Pursley's

opinion, the claimant's failure to follow medical advice was "the major contributing factor" that caused his foot infection not to heal and to progress to the point of requiring amputation. He thought that it probably would have healed had the claimant followed Dr. Powsat's treatment plan, controlled his diabetes as instructed, and refrained from wearing regular shoes, walking on the infected foot, and smoking. Dr. Pursley attributed all of the claimant's present complaints to the amputation and stated that it warranted an 8% permanent impairment rating.

Dr. Amis, an orthopedic surgeon, performed another independent medical evaluation for the employer in June, 2004. He noted that a callus was observed on the ball of the left foot on April 17, 2003, and that the claimant's symptoms were classic for diabetes and of the sort that precede ulceration. On that basis, he attributed the infection and amputation to the claimant's failure to see the podiatrist in June, 2003, rather than to the subsequent, work-related injury. He thought that smoking probably had a minimal impact on the need for amputation but that the claimant's failure to follow the treatment protocol for diabetes had a definite impact on the ulceration, the need for amputation, and the resulting Charcot changes in his foot.

The claimant testified that the employer refused to pay any of his medical expenses after the injury. He acknowledged that he had smoked up to two packs of cigarettes per day in July, 2003, and that he was advised to stay off his foot as much as possible and to stop smoking. Asked if he was able to stop or to cut back, he stated that he did not think smoking had anything to do with his foot problems.

The claimant's wife testified that she helped to manage his diabetic condition by preparing his meals and being certain that he had the necessary medications. She took off work to accompany him to medical appointments and helped him to care for his

foot. Although they were advised to have home health care, they cared for the foot the best that they could because they had no insurance. They thought that it was healing. However, her husband came in from the back field one day and complained that his foot was so painful that he could not stand it. She called Dr. Pawsat, who advised him to come in immediately, then hospitalized him and performed the amputation.

Among the contested issues before the ALJ were: causation/work-relatedness; medical expenses; TTD; and failure to follow reasonable medical advice. The ALJ determined that the sprained ankle caused only the blister. Citing KRS 342.035(3) and the numerous instances in which the claimant failed to comply with Dr. Powsat's instructions, the ALJ found that the need for further medical treatment and the amputation was caused by his unreasonable failure to follow Dr. Pawsat's advice. Noting that the entire permanent impairment rating was based on the amputation, the ALJ awarded no permanent income benefits but did award medical benefits until August 5, 2003, when Dr. Pawsat gave the claimant direct instructions that he failed to follow. On reconsideration, the ALJ also awarded TTD benefits through August 25, 2003, when Dr. Pawsat noted that the claimant was still not following the directions that he had reiterated on August 5, 2003. The balance of the claimant's petition for reconsideration and request for additional findings was overruled, and he appealed.

KRS 342.035(3) provides, in pertinent, part as follows:

> No compensation shall be payable for the death or disability of an employee if his death is caused, or if and insofar as his disability is aggravated, caused, or continued, by an unreasonable failure to submit to or follow any competent surgical treatment or medical aid or advice.

Chapter 342 does not penalize workers whose pre-existing state of health renders them more vulnerable to injury and disability. KRS 342.0011(1) permits

compensation for a harmful change in the human organism if work-related physical trauma is "the proximate cause" producing it. A longstanding principle of Chapter 342 is that a worker may be compensated for all of the harmful changes that flow from work-related trauma that are not attributable to an independent, intervening cause. Beech Creek Coal Co. v. Cox, 237 S.W.2d 56 (Ky. 1951); Elizabethtown Sportswear v. Stice, 720 S.W.2d 732 (Ky. App. 1986). Consistent with the principle that an independent, intervening cause will break the chain of causation, KRS 342.035(3) precludes compensation "if and insofar as" a worker's disability results from an unreasonable failure to follow competent medical advice. Allen v. Glenn Baker Trucking, Inc., 875 S.W.2d 92, 94 (Ky. 1994), explains that the statute encompasses medical advice that, if followed, would have prevented further injury or disability, and it requires the worker to mitigate his damages. As stated in Luttrell v. Cardinal Aluminum Company, 909 S.W.2d 334 (Ky. App. 1995), it provides an affirmative defense in which the employer has the burden of proving that the worker failed to follow competent medical advice; that the failure was unreasonable; and that the unreasonable failure caused the disability for which compensation is denied. Fordson Coal Co. v. Palko, 282 Ky. 397, 138 S.W.2d 456 (1940), explains that a refusal to comply with a treatment recommendation is unreasonable if the treatment is free from danger to life, health, and extraordinary suffering and if, according to the best medical or surgical opinion, the treatment offers a reasonable prospect of restoration or relief from disability.

The claimant asserts that the ALJ failed to make adequate findings of fact regarding the employer's refusal to pay any medical expenses voluntarily. He argues that under Black Star Coal Co. v. Surgener, 181 S.W.2d 53 (Ky. 1944), an employer must prove that it made a bona fide offer to bear the expense of a treatment that it

alleges the injured worker refused. He also relies on Allen v. Glenn Baker Trucking, Inc., supra. Emphasizing that his employer did not offer him a wheelchair, crutches, or other equipment to help keep weight off his foot, he argues that it could not later assert that his disability resulted from his failure to do so. We disagree.

In Black Star Coal Co. v. Surgener, supra, the worker sustained a work-related compound fracture of the tibia that failed to unite properly. After the parties completed proof-taking, the employer moved to hold the matter in abeyance and to compel the worker to have a corrective surgery. Upholding the motion's denial, the court refused to consider whether it would be reasonable for the worker to refuse to undergo the procedure, noting that the employer had neither offered to bear its cost nor asked him to undergo it voluntarily. This is not such a case.

In Allen v. Glenn Baker Trucking, Inc., supra, the worker was given medication at the hospital following a severe reaction to work-related bee stings and was advised not to drive for the remainder of the day. The employer offered to take him home, but he insisted that he could drive himself and sustained additional injuries while doing so. An ALJ found that his conduct was unreasonable, and the decision was affirmed on appeal.

Although employers usually provide voluntary medical benefits in order to minimize the disability that a work-related injury causes, we noted in R. J. Corman Railroad Construction v. Haddix, 864 S.W.2d 915, 918 (Ky. 1993), that an employer has no obligation to pay benefits in a disputed claim until they are awarded. In the present case, the employer asserted that only the sprained ankle was work-related and submitted medical evidence that the blister and infection were due solely to the claimant's diabetic condition. On that basis, it refused to pay for treating the blister and

its complications. The claimant has pointed to no authority that requires an employer to pay for treating a condition that it reasonably believes is not work-related in order to preserve an argument under KRS 342.035(3).

Contrary to the claimant's assertion, there was no difference of medical opinion between Dr. Gallenstein and Dr. Pawsat regarding the need for him to stay off his feet. Dr. Gallenstein permitted the claimant to work, initially, but referred him to Dr. Pawsat after his own treatment failed. After Dr. Pawsat debrided the site of the infection, he instructed the claimant repeatedly not to put weight or pressure on the foot, informed him that the wound would not heal if he continued to do so, and warned him of the potential consequences. He also advised the claimant to refrain from smoking, but the claimant failed to comply with either instruction, even after the amputation. Nor did he comply with his physicians' advice regarding the management of his diabetes though they informed him that failing to do so decreased his ability to heal.

Testimony from Drs. Pursley and Dr. Pawsat provided substantial evidence that the claimant failed to follow competent medical advice, that his conduct was unreasonable, and that it was the proximate cause producing the harmful changes that occurred after August 5, 2003. Therefore, we find no error in the decision to award medical benefits only until August 5, 2003. Their testimony also provided substantial evidence that the claimant's entire permanent impairment rating was due to the amputation and that it would not have occurred if he had followed his physicians' advice. Therefore, we find no merit in the claimant's assertion that the ALJ failed to determine the degree to which his conduct contributed to his disability and deduct that portion from the award as was done in Elmendorf Farms v. Goins, 593 S.W.2d 81 (Ky. App. 1979).

The decision of the Court of Appeals is affirmed.

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

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Supreme Court of Kentucky

2006-SC-000576-WC

RONNIE JOHNSON — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-1958-WC
WORKERS' COMPENSATION NO. 03-02514

CHERNE CONTRACTING COMPANY,
WORKERS' COMPENSATION BOARD
AND HON. LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE — APPELLEES

DISSENTING OPINION BY CHIEF JUSTICE LAMBERT

Respectfully, I disagree with the majority's application of KRS 342.035(3) in the instant case. I believe this Court's decision in Proven Products Sales and Service v. Crutcher,[1] properly distinguishes specific medical mandates or prohibitions as contemplated by KRS 342.035(3) from broad medical admonitions such as dieting to lose weight. The medical advice contemplated by the statute encompasses directives that can be followed with specific and limited action; it should not operate to preclude compensation for failure to follow expansive directives that require constant, continuous actions geared toward improving health.

[1] 464 S.W.2d 800 (Ky. 1971).

The medical advice given Appellant included a broad variety of lifestyle changes, including smoking cessation, putting absolutely no weight on the foot, and controlling and managing diabetes. This is clearly distinguishable from the directive in Allen v. Glenn Baker Trucking, Inc.[2] to refrain from driving for the remainder of only one day. It is more akin to the advice given in Proven Products and failure to comply should not be a bar to compensation.

Fundamental to the Worker's Compensation Act is that recovery shall be allowed without regard to fault.[3] Equally fundamental is that the employer shall pay for the cure and relief from the effects of injury or occupational disease.[4] Despite these basic principles, application of KRS 342.035(3) in this case has resulted in frustration of the purposes of the Act and reinstated post-injury fault as a feature of Worker's Compensation recovery. The negative effect of denial of recovery in this case is exacerbated by the employer's refusal to pay any of Appellant's medical expenses after the initial injury and refusal to pay temporary total disability benefits. Incongruously, Appellant has been penalized for putting weight on his foot after the employer refused to pay for a wheel chair or crutches.

This Court should not read KRS 342.035(3) so expansively. Hardly a person has not been told by a physician to get more exercise, lose weight, and refrain from smoking. Despite this sound advice, one need only look around to realize that it is frequently disregarded. Some human beings possess the strength of character to lead

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[2] 875 S.W.2d 92 (Ky. 1994).
[3] KRS 342.610.
[4] KRS 342.020.

a perfect lifestyle while others do not. I trust this case does not signal emergence of a new "lifestyle" defense in Worker's Compensation cases.

Scott, J., joins this dissenting opinion.