

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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NOT TO BE PUBLISHED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

FINAL

2006-SC-000756-WC

DATE 6-14-07 ELLA Groum, DC

PINE MOUNTAIN LUMBER CO., LLC.

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2006-CA-000484-WC
WORKERS' COMPENSATION NO. 03-74856

CARLOS J. ADAMS,
HON. HOWARD E. FRASIER, JR.,
ADMINISTRATIVE LAW JUDGE, AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Having found that the claimant sustained a work-related back injury and resulting psychological injury, an Administrative Law Judge (ALJ) awarded permanent total disability benefits. The Workers' Compensation Board and the Court of Appeals rejected the employer's assertion that the decision was erroneous as a matter of law and affirmed. Having concluded that substantial evidence supported the award, we also affirm.

The claimant was born in 1975, received an eighth-grade education with no specialized or vocational training, and worked as a laborer in the defendant-employer's sawmill. He testified that he injured his back on August 25, 2003, while helping to lift a

200-pound cant that had fallen off a saw.¹ He stated that he felt a pulling sensation in his back. It was followed immediately by pain that increased throughout the day, causing him to leave work early and seek medical treatment. He testified that he had never been treated by a psychologist or psychiatrist before the injury. When the claim was heard, he complained of intense back, hip, and leg pain; took medication for pain and depression; and did not think that he could return to work.

The claimant was treated initially by Dr. Domingo, who prescribed medication and physical therapy. Dr. Sujata Gutti, a neurologist, performed trigger point injections and also prescribed physical therapy. Dr. Sai Gutti began pain management therapy in April, 2004.

Dr. Sai Gutti noted MRI evidence of an L5-S1 bulge and diagnosed low back pain secondary to the work-related injury, bilateral lower extremity radiculitis, paresthesia, moderate to severe sacroiliitis, and restless leg syndrome. Dr. Gutti also noted significant reactive depression from pain and anxiety. On September 2, 2004, Dr. Gutti released the claimant to return to light-duty work with no bending, stooping, or lifting more than 10 pounds. Shortly thereafter, the employer discontinued voluntary temporary total disability (TTD) benefits.

Dr. Kennedy, an orthopedic surgeon, evaluated the claimant in November, 2004. In his opinion, the work-related injury caused a low back sprain that, in turn, caused a psychogenic response known as camptocormis (bent back syndrome). Although he found no objective evidence of a permanent physical impairment, he stated that he was neither qualified nor trained to assess any impairment due to psychogenic or emotional

¹ The claimant explained that a cant is a squared up block of wood that can be from 8 to 16 feet long.

factors. He thought that the claimant could not work until the conditions were evaluated and possibly treated.

Dr. Zerga, a neurosurgeon, evaluated the claimant for the employer in January, 2005. He noted that the claimant's head shook constantly, and he was bent over at the waist as he walked. He could not move his back up or down and would not participate in range of motion testing. Dr. Zerga characterized the symptoms as "rather bizarre," thought that anxiety appeared to play a major role, and recommended a psychological consultation and perhaps treatment. At best, the claimant's permanent impairment rating fell within DRE lumbar category II, based upon significant lower back guarding and stiffness. Because a lower extremity EMG was normal, with no evidence of peripheral neuropathy or radiculopathy, Dr. Zerga placed him at the lower end or 5%. He thought it obvious that the claimant could not return to work but that there was no objective evidence of a compensable disorder.

Dr. Johnson, a psychologist, evaluated the claimant in December, 2004, at which time he complained that he was easily frustrated and angered, had difficulty concentrating, avoided others, cried at times, and had difficulty with activities of daily living. He tested at the third grade reading level and had symptoms of generalized anxiety, obsessive compulsive dysfunction, and depression. Dr. Johnson concluded that he was not malingering and thought that out-patient treatment could reduce his symptoms. In his opinion, the obsessive compulsive characteristics were pre-existing, but the chronic pain, physical restrictions, and stresses from the inability to work after the injury caused the depression. It warranted a moderate or 25-30% permanent impairment rating.

Dr. Ludgate, a clinical psychologist, evaluated the claimant in February, 2005, at

which time he was tremulous, agitated, and made poor eye contact. Dr. Ludgate diagnosed major depression, single episode, moderate without psychotic features; generalized anxiety disorder; borderline intellectual functioning; and lumbar back pain. Noting the absence of any pre-injury mental health problems, he attributed the anxiety and depression to the work-related injury and assigned a class III or 30-35% permanent impairment rating. He recommended long-term medication and counseling, and he saw little or no possibility that the claimant could work in his present mental state.

Dr. Shraberg, a psychiatrist, evaluated the claimant for the employer in January, 2005. Noting that the claimant presented in a very melodramatic manner and that he self-dramatized, was defensive, drove a car away from the interview, and used a cell phone, Dr. Shraberg concluded that he was malingering. He stated that psychological testing suggested somatization, and he attributed the claimant's behavior to conscious and unconscious decisions to be disabled. In his opinion, the claimant's ability to get into his car and drive contradicted his claims of pain and limitations. If he were able to drive the entire way home, he was 100% malingering. Dr. Shraberg attributed no permanent psychiatric impairment to the injury.

Dr. Shraberg took issue with Dr. Johnson's conclusions, stating that they were based on the erroneous assumption that the claimant's physical complaints were entirely credible and resulted in psychological complaints. In his opinion, no documented physical injury explained the psychological complaints, and the neurological and physical examinations indicated that the underlying cause was psychogenic. He also thought that the permanent impairment rating assigned by Dr. Ludgate was excessive because the claimant was able to drive and care for himself. He acknowledged on cross-examination that his opinion that the claimant was

consciously malingering was only a possibility. Another possibility was a factitious illness, in which an individual complains of physical symptoms for attention. A third possibility was an hysterical conversion disorder, in which physical symptoms develop unconsciously without an actual physical injury.

In an amended report, Dr. Zerga stated that he had extensive psychiatric background and was board-certified in psychiatry as well as being a neurosurgeon. He stated that after reviewing the reports from Drs. Johnson and Shraberg, his present opinion was that the claimant was malingering. He had a 0% permanent impairment rating for the back condition and required no work restrictions.

The ALJ summarized the evidence in detail, finding the reports from Drs. Johnson and Ludgate to be more credible than Dr. Shraberg's report or Dr. Zerga's amended report. The ALJ noted that Dr. Shraberg had admitted that malingering was only a possibility. Rejecting Dr. Shraberg's opinion that the period of time between the physical injury and the psychological symptoms indicated that they were unrelated, the ALJ explained that the symptoms arose while the claimant was being treated for the back injury and receiving voluntary TTD benefits, and they continued at all times thereafter. The MRI, which revealed a disc bulge, and the physical examination, which revealed significant guarding and stiffness in the low back, constituted objective medical findings of a harmful physical change that warranted a 5% permanent impairment rating. Convinced that the psychological condition directly resulted from the physical injury, the ALJ found that it was compensable and resulted in a 35% permanent impairment rating. Convinced that the physical condition severely limited the claimant's job opportunities but was only partially disabling, the ALJ relied on Dr. Ludgate and found that the psychological condition rendered him unable to work.

The employer continues to argue that the award is arbitrary, capricious, and clearly erroneous under the evidence and that Dr. Zerga's amended report clearly indicated that the August, 2003, incident caused no permanent impairment rating based on the back. The employer asserts that there was no physical injury and that the ALJ erred by awarding benefits for what was actually a mental/mental injury. We disagree.

As pertinent to these facts, KRS 342.0011(1) defines the term "injury" as being:

any work-related traumatic event . . . arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. . . . "Injury" . . . shall not include a psychological, psychiatric, or stress-related change in the human organism, unless it is a direct result of a physical injury.

In Lexington-Fayette Urban County Government v. West, 52 S.W.3d 564 (Ky. 2001), and in McCowan v. Matsushita Appliance Co., 95 S.W.3d 30 (Ky. 2003), the court explained that a harmful psychological change is compensable if it directly results from physical trauma and that the statute requires no permanent physical harm.

KRS 342.285 designates the ALJ as the finder of fact and prohibits a reweighing of the evidence on appeal. The ALJ determined in the present case that the claimant satisfied his burden of proving permanent physical and psychological harms due to lifting the cant. Thus, the issue on appeal is whether substantial evidence supported the decision, in other words, whether it was reasonable under the evidence. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

The claimant had no back symptoms before the injury, and MRI revealed a bulging disc after the injury. Dr. Zerga observed guarding and stiffness when he examined the claimant and based the 5% permanent impairment rating on those findings. He did not re-examine the claimant when preparing the amended report. He

based it on psychological reports from Drs. Johnson and Shraberg. Therefore, the ALJ was not required to find Dr. Zerga's amended report to be more reliable evidence concerning the claimant's lumbar impairment than his initial report. Dr. Ludgate's opinion also provided substantial evidence that a psychological condition directly resulted from the physical trauma and prevented the claimant from working.

The decision of the Court of Appeals is affirmed.

All concur.

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