

**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**NOT TO BE PUBLISHED OPINION**

**THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**

**Supreme Court of Kentucky** **FINAL**

2006-SC-000786-WC

DATE 10-11-07 E.A. Brown, D.C.

LARRY BROCK

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS  
2006-CA-001048-WC  
WORKERS' COMPENSATION NO. 84-25962

MANALAPAN MINING COMPANY  
SPECIAL FUND, HON. IRENE STEEN,  
ADMINISTRATIVE LAW JUDGE,  
WORKERS' COMPENSATION BOARD, AND

APPELLEES

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

An Administrative Law Judge (ALJ) dismissed the claimant's motion to reopen based on findings that he was no more disabled at reopening than he had been at the time of the initial award and that any change in his condition was due to the natural aging process. The Workers' Compensation Board (Board) and the Court of Appeals affirmed. We affirm.

The claimant was born in 1953, completed the ninth grade, and had a history of performing heavy manual labor. In 1984, he experienced a sudden onset of lower back pain while shoveling coal at work. Diagnostic tests revealed the presence of a herniated lumbosacral disc and/or degenerative changes. The four testifying physicians characterized the injury differently and assigned impairment ratings that ranged from

0% (low back strain) to 20% (herniated disc). Two physicians restricted heavy lifting, bending, and stooping. The claimant's application for benefits alleged that he had become permanently and totally occupationally disabled.

The parties stipulated the claimant sustained a work-related injury and gave adequate notice. The "old" Board found that he was unable to return to heavy physical labor but determined that his permanent occupational disability under Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968), was only 70%. Convinced that the injury aroused a pre-existing disease or condition and caused it to become disabling, the Board apportioned liability for income benefits equally to the employer and the Special Fund under KRS 342.120. The claimant never returned to work. He later sought and received a social security disability award.

The workers' compensation claim lay dormant until April 27, 1998, when the claimant filed a motion to reopen based upon an alleged worsening of condition and increase in occupational disability due to the injury. Attached to the motion were reports of increased physical restrictions, various cervical and thoracic abnormalities, unsuccessful pain management treatment, and a newly-alleged psychiatric condition. The motion was granted to the extent that the parties were permitted to take additional proof. After a March, 1999, benefit review determination in which an arbitrator found the claimant to be totally disabled, the employer sought de novo review before an ALJ. The matter was reassigned for that purpose in April, 1999.

As indicated in the pre-hearing conference memorandum, the contested issues included the extent and duration of disability, whether there was a worsening of condition, whether the claimant's psychological and cervical problems were caused by

the injury, and whether various prescription drugs were compensable. At the August, 1999, hearing, the parties agreed to place the claim in abeyance to permit Dr. El-Naggar to perform further diagnostic testing and possibly surgery.

Diagnostic studies revealed a small disc herniation and other abnormalities at L5-S1 for which Dr. El-Naggar recommended surgery. They also revealed abnormalities at the cervical and thoracic levels for which he recommended non-surgical treatment. However, the employer refused to authorize treatment on the grounds that the cervical and thoracic conditions were unrelated to the injury and that any changes in the lumbar condition were due to the natural aging process. Thus, the claimant filed a motion to compel payment.

In an order entered on January 14, 2000, the ALJ directed the employer to authorize "treatment and/or surgery for Plaintiff's low back problems which are clearly associated with the work-related injury herein" but found that no persuasive testimony linked a psychiatric condition or the use of psychotropic medication to the work-related injury. The remainder of the claim was held in abeyance. Pursuant to the claimant's motion for clarification, the ALJ stated in a subsequent order that the employer was liable for the lower back treatment that Dr. El-Naggar recommended but that it had no liability for the cervical, thoracic, or psychological conditions. Shortly thereafter, counsel for the claimant moved for leave to withdraw, explaining that differences had arisen between them. The motion was granted.

Dr. Lockstadt performed the recommended surgery, and the claimant obtained new counsel. In May, 2002, the ALJ granted his motion to remove the claim from abeyance and schedule a final hearing. The second hearing was continued at the

parties' request due to settlement negotiations. At the hearing, the ALJ placed the claim in abeyance again because the claimant thought that he might undergo another surgical procedure. At a third hearing, held in July, 2003, the claim was again placed in abeyance to enable the parties to conduct settlement negotiations. After two years passed with no activity of record, the ALJ scheduled a status conference for May, 2005. The parties attempted yet again to negotiate a settlement but were not successful; thus, the claimant requested a final hearing which was held on September 15, 2005.

After being questioned by his attorney at the hearing, the claimant requested and received permission from the ALJ to speak. He indicated that he and his attorney disagreed regarding the maximum income benefit that he could receive without experiencing an offset in his social security disability benefit. The ALJ interpreted these comments as questioning the attorney's veracity and indicated that the attorney might wish to withdraw from the representation. The claimant then apologized for any misunderstanding, and counsel moved to strike the entire exchange as being irrelevant to the matters at issue. The ALJ denied the motion and granted the claimant's request to submit a copy of a letter that indicated he could receive the maximum income benefit without incurring an offset in his social security disability benefit. The parties received additional time to file briefs, after which the ALJ took the claim under submission.

After reviewing the medical records from the initial claim, particularly the myelographic studies, and after noting that the disc defect was on the right side but that the claimant's complaints were consistently on the left side, the ALJ noted that the actual injury appeared to have been a strain or sprain that had aroused pre-existing degenerative changes. Although there was no post-award evidence of instability, nerve

root impingement, or neurological deficits, the claimant's physicians had recommended fusion surgery. The procedure was successful, technically, but failed to relieve his symptoms. He had been physically inactive in the 22 years since the injury, which had hastened the natural aging process, and had taken increasingly larger amounts of narcotic and other medication. Moreover, he had neither worked nor looked for another job. The ALJ concluded that the claimant's occupational disability was no greater at reopening than it had been at the time of the initial claim and dismissed the claim for additional income benefits. Because neither the "old" Board's decision nor the medical evidence indicated that the claimant injured anything but his lower back in 1984, the ALJ found that his cervical and thoracic complaints were not work-related. Relying on Dr. Shraberg, the ALJ found that his psychological problems were not work-related.

The ALJ overruled the claimant's petition for reconsideration, after which counsel terminated the representation. Acting pro-se, the claimant requested another hearing, asserting that the ALJ denied him due process by refusing to permit him to present all relevant evidence and by pre-judging the merits; that the ALJ pressured him to settle his claim for an inadequate amount of compensation and became angry when he refused to comply; that the ALJ erred by questioning him at the hearing; and that the ALJ abused her discretion by dismissing his claim out of vindictiveness. While the motion was pending, he also filed a notice of appeal to the Board. The Chief ALJ considered the claimant's motion and denied it, noting that neither Chapter 342 nor the regulations provided for such a rehearing.

The claimant continues to argue that he was denied due process and did not receive a fair and impartial hearing due to the ALJ's anger at his failure to settle his

claim. The Fourteenth Amendment of the United States Constitution prohibits a state from denying a person of property without due process of law. The term due process refers to the right to reasonable notice of the matter at issue and an opportunity to be heard according to regular and established rules of procedure. Parrish v. Claxon Truck Lines, 286 S.W.2d 508, 512 (Ky. 1956). The Second Amendment of the Kentucky Constitution prohibits the state from action that is arbitrary, a concept that the courts have found to be broad enough to embrace due process and equal protection, fundamental fairness and impartiality. Commonwealth Natural Resources and Environmental Protection Cabinet v. Kentec Coal Co., Inc., 177 S.W.3d 718 (Ky. 2005).

Contrary to the claimant's assertions, the reopening proceedings complied with both provisions. The claimant has pointed to no evidence that the ALJ refused to permit him to submit. He testified multiple times and presented testimony from a number of expert witnesses. The ALJ held a pre-hearing conference on August 3, 1999, and held hearings on August 16, 1999; September 23, 2002; July 1, 2003; and September 14, 2005. At the final hearing, she gave the claimant permission to submit a letter regarding his eligibility to receive the maximum income benefit without subjecting his social security disability benefit to offset. Mindful that the time for taking proof had long expired, we are not convinced that a comment about the delay submitting the letter revealed prejudice. The parties received three weeks after the final hearing to file briefs, and ALJ rendered a decision on November 11, 2005. At no time did the claimant complain of a delay in resolving the claim, and the delays that did occur were largely due to his physical complaints and the unsuccessful settlement attempts. Thus, we find no merit in his assertion that the decision was not rendered "a meaningful time after the

case was assigned to [the ALJ]."

The record indicates that the ALJ conducted the hearing properly and engaged in a reasoned and impartial consideration of the evidence. Among other things, KRS 342.275(1) requires the parties and ALJ to hold a pre-hearing benefit review conference (BRC), the purpose of which is to define and narrow issues, to discuss settlement, and to consider other relevant matters that may aid in the disposition of the case. Consistent with KRS 342.275(1), 803 KAR 25:010, § 13 states that the purpose of the BRC is to "expedite the processing of the claim and to avoid if possible the need for a hearing." Thus, it would be unreasonable to assume that comments allegedly made at a BRC about the state of the evidence reveal bias.

Nothing prevents an ALJ from questioning a worker in an attempt to better understand the evidence so long as the ALJ remains impartial. In fact, questions that the ALJ posed to the claimant during the August 16, 1999, hearing led her to conclude that the surgery he requested was reasonable, necessary, and related to his injury. However, the claimant complains that the ALJ had become hostile by the September, 2005, hearing and asserts that her comments after his testimony concerning social security benefits reveal bias. Having reviewed the entire hearing transcript, we find nothing in the ALJ's questioning that was improper.

It was within the ALJ's discretion to grant the claimant's request to speak after counsel finished questioning him at the final hearing. At that time, he asserted that he and his attorney disagreed over whether his social security benefit would be subject to offset. Although the possibility of a social security offset might have affected the terms of a settlement had one been reached, it was irrelevant to his right to receive additional



income benefits in the reopening. Contrary to the claimant's assertions, the record reveals the ALJ's questions to be an attempt to determine the truth of the matter and to discern whether the disagreement jeopardized the attorney-client relationship.

It was the claimant's burden to prove every element of his claim at reopening. Because he failed to convince the ALJ that he was entitled to additional income benefits or that his cervical, thoracic, or psychological complaints resulted from the injury, which would have entitled him to medical benefits for the conditions, it is his burden on appeal to demonstrate that overwhelming evidence compelled a favorable result. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). He has failed to meet that burden.

In order to receive additional income benefits at reopening, the 1998 version of Chapter 342 required the claimant to prove: 1.) a post-award increase in his occupational disability under the Osborne v. Johnson, supra, standard; and 2.) that the increase was due to a worsening of his condition due to the injury. In view of the claimant's testimony that he had neither worked nor looked for another job since the initial injury, the evidence clearly did not compel a finding that his occupational disability was any greater at reopening than it had been at the time of the initial claim. Therefore, he was not entitled to greater income benefits, regardless of what caused his physical condition to worsen.

Contrary to the claimant's assertions, we find no error in the ALJ's consideration of the evidence. The medical evidence in the initial claim was conflicting, and at no time did the "old" Board make a specific finding that the back injury caused a herniated disc. Therefore, a statement in the decision at reopening that the injury appeared to have caused only a sprain/strain did not contradict the initial decision. Likewise,

although the ALJ summarized the medical evidence as presented, including Dr. Goodman's testimony paraphrasing the inaccurate history recorded by Dr. Templin, nothing in the decision indicates that she attributed any portion of the claimant's condition to a motor vehicle accident. In fact, she noted that Dr. Templin attributed the claimant's entire condition and impairment to the work-related injury but that Dr. Goodman attributed the cervical and thoracic complaints and the worsening lumbar complaints to the combined effects of the natural aging process and claimant's total physical inactivity. While a statement acknowledging Dr. Templin's correction of his earlier mistake would have precluded any question that the ALJ understood the evidence accurately, such a statement was unnecessary.

The decision of the Court of Appeals is affirmed.

Lambert, C.J., and Cunningham, Minton, Noble, Schroder, and Scott, JJ.,  
concur. Abramson, J., not sitting.

LARRY BROCK, PRO-SE :  
P.O. BOX 401  
EAST BERNSTADT, KY 40729

COUNSEL FOR APPELLEE,  
MANALAPAN MINING COMPANY:

GAYLE G. HUFF  
HUFF LAW OFFICE  
417 E. MOUND STREET  
P.O. BOX 151  
HARLAN, KY 40831