

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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-000831-WC

DATE 10-11-07 E.L.A.G. FAH, DC.

VENDOME COPPER & BRASS WORKS

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
2006-CA-001073-WC
WORKERS' COMPENSATION NO. 03-96796

JAMES SCHEHR;
HON. LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
THE WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined in an interlocutory order that surgery recommended by the claimant's treating physician was neither reasonable nor necessary treatment for his work-related back injury but based the subsequent decision awarding benefits on the physician's opinion that the injury caused a 13% permanent impairment rating. Although the Workers' Compensation Board and the Court of Appeals affirmed, the employer continues to argue that the ALJ's decisions were inconsistent and that the award was not supported by substantial evidence. We affirm.

On April 8, 2002, the claimant fell from a height of about 12 to 14 feet while working on a ladder. He landed on his left hip, buttock, and shoulder and experienced immediate low back pain. He experienced left shoulder pain later that day and

subsequently had surgery to repair the rotator cuff. The ALJ found subsequently that the left shoulder condition warranted a 5% permanent impairment rating. This appeal concerns only the back injury.

Dr. Rouben, a board-certified orthopedic surgeon, was the claimant's treating physician. Dr. Rouben interpreted an MRI as revealing a compression fracture at L1, which caused the claimant's spine to tilt abnormally. It also revealed disc degeneration at T12-L1 and L5-S1. He attributed both conditions to the work-related injury. Although epidural steroid injections and a facet ablation helped to relieve the claimant's lumbosacral symptoms, narcotic pain medication and other conservative treatment failed to relieve his thoracolumbar symptoms. Thus, Dr. Rouben recommended an anterior/posterior fusion from T11 through L2 to restore normal posture and relieve the resulting muscle fatigue and symptoms. The procedure would cost about \$25,000.00.

Dr. Kirsch, board-certified in orthopedic surgery, reviewed the claimant's medical records for the employer. He concluded that the request for surgery was unrelated to the April, 2002, injury. On that basis, the employer refused to authorize the procedure.

When deposed subsequently, Dr. Rouben explained the reasons his opinion that the injury caused the compression fracture. He acknowledged that the radiologists' characterization of the fracture as being old was reasonable but pointed out that even if the fracture were old, it became symptomatic only after the injury. Thus, "the fall would have had an aggravating effect and [brought] any prior physical problems into disabling reality."

Additional proof was taken, and the ALJ bifurcated the claim to consider the reasonableness and necessity of the proposed surgery. At the hearing, the claimant testified that he was taking Avinza, a form of morphine. It had begun to provide enough

relief that he could continue to work full time.

After reviewing the conflicting medical evidence, the ALJ expressed "extreme reservations about the wisdom of having such an invasive and radical procedure" and chose to rely on Dr. Guarnaschelli, who had evaluated the claimant on April 29, 2004. Dr. Guarnaschelli thought that the work-related fall had aggravated an old compression fracture at L1 but strongly advised against surgery to relieve the claimant's symptoms unless he developed progressive and intractable pain and/or progressive neurological deficits. Neither was present at that time. On December 7, 2004, the ALJ entered an interlocutory order finding that the proposed surgery was neither reasonable nor necessary and that the employer was not required to pay its cost.

After additional medical evaluations and another hearing, the ALJ considered balance of the claim. The claimant presented medical reports from Drs. Chou, Raque, and Rouben. He and his wife testified to his continued pain and to the changes in their lifestyle due to the injury. They also testified to his unsuccessful attempts to return to work. Drs. Guarnaschelli and Best testified for the employer.

Dr. Chou was the claimant's treating pain management specialist. He prescribed Avinza in February, 2005, and noted that long-term pain control would probably be necessary. He saw the claimant again in May, 2005, in conjunction with the functional capacity evaluation that Mr. DeYoung performed. It indicated that the claimant was capable of working an eight-hour day at light duty. In June, 2005, the claimant complained of increased pain and difficulty sleeping. He stated that the Avinza had helped and received a prescription for a refill.

Dr. Raque, a board-certified neurosurgeon, evaluated the claimant in January, 2005. He did not recommend surgery but did recommend pain management. He also

recommended a repeat MRI, which was performed. In March, 2005, he noted that the study revealed some facet arthritis at L4-5 and L5-S1 but no disc rupture or canal stenosis. He "did not see anything that a simple decompressive procedure [would] help" and referred the claimant an orthopedic surgeon.

Dr. Rouben reported that the claimant would have continuous and permanent pain and limitations without the reconstructive stabilizing procedure that he recommended. He assigned a 5% permanent impairment rating to the shoulder condition and a 13% permanent impairment rating (DRE category III) to the thoracolumbar and lumbar back conditions, which yielded a combined permanent impairment rating of 15%.

Dr. Guarnaschelli reported a compression fracture of L1 and degenerative changes at L5-S1, stating that they were pre-existing and related to previous injuries or the effects of aging. Based on the clinical and radiographic findings, he diagnosed persistent low back pain syndrome, predominantly in the lower lumbar and left S1 joint. He thought that the work-related injury aggravated the pre-existing conditions, causing greater pain and muscle spasms, and he assigned a 5% permanent impairment rating based upon musculoskeletal pain, restricted range of motion, and subjective sensory disturbances. He strongly advised against surgery or the use of addictive medication.

Dr. Best, a board-certified orthopedic surgeon, evaluated the claimant in June, 2005. He found no evidence of a herniated disc or nerve root impingement and nothing that required surgery. He thought that the claimant was at maximum medical improvement, required no additional diagnostic or pain management treatment, and should be weaned from the Avinza. Dr. Best diagnosed low back pain with facet arthropathy for which he assigned a 5% permanent impairment rating (DRE lumbar

category II). Although he found no new or acute process due to the claimant's fall onto his left buttocks, he stated that the pain might well be secondary to the work-related fall because the degenerative changes were more severe in the facet joints at L4-5 on the left than on the right. In his opinion, the shoulder condition warranted no permanent impairment rating.

The ALJ determined that the claimant lacked the physical capacity to return to his former work but was not totally occupationally disabled. Relying on the 15% permanent impairment rating that Dr. Rouben assigned, the ALJ awarded benefits under KRS 342.730(1)(b) and (1)(c)1. The award included vocational rehabilitation services under KRS 342.710.

The employer's petition for reconsideration stated that Dr. Rouble's findings "were based on a complete misunderstanding of the claimant's problem" and requested specific findings explaining why the ALJ viewed the permanent impairment rating that he assigned to be most appropriate. Emphasizing that the compression fracture was old, the employer asserted that it was a pre-existing, active condition and was not compensable. The ALJ denied the petition as exceeding the scope of KRS 342.281.

Appealing, the employer states that the 13% lumbar impairment was based on a diagnosis that the ALJ rejected when denying the request for surgery. Therefore, the resulting award was arbitrary, capricious, and not based upon substantial evidence. In the alternative, the employer asserts that the claim must be remanded for further findings of fact. We disagree.

The ALJ was not bound by the interlocutory decision when finally deciding the merits of the claim and was free to reverse or modify it. Union Light, Heat & Power Co. v. Public Service Commission, 271 S.W.2d 361 (Ky. 1954); Western Kraft Paper Group

v. Department for Natural Resources and Environmental Protection, 632 S.W.2d 454 (Ky. App. 1982). In any event, there was no inconsistency between the interlocutory and final decisions. The diagnosis and treatment of a medical condition are different matters. A physician may diagnose a condition properly yet prescribe an unreasonable or unnecessary method for treating it. Thus, an ALJ's reservations concerning the wisdom of a treatment that a physician proposes do not necessarily imply reservations concerning the physician's diagnosis.

Contrary to the employer's assertion, the interlocutory order did not reject Dr. Rouben's diagnoses or state that the thoracolumbar complaints were unrelated to the fall at work. It noted that medication enabled the claimant to work full time, that Dr. Guarnaschelli strongly opposed the proposed surgery, and that the procedure was costly, invasive, and radical. The order concluded that the procedure was neither reasonable nor necessary but contained no specific finding regarding the nature of the claimant's back injury. Thus, the decision to deny the surgery that Dr. Rouben proposed did not conflict with the subsequent decision to rely on the 13% permanent impairment rating that he assigned rather than the 5% rating that Drs. Guarnaschelli and Best assigned. Moreover, the decision to award benefits based on 13% permanent impairment rating implied a finding that the entire impairment was due to the fall at work and, therefore, that it was compensable.

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.

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