

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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-000946-WC

DATE 1-10-08 E.L.A.C. 10/14/07 P.C.

JOSEPH KOROLUK

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
2006-CA-001418-WC
WORKERS' COMPENSATION BOARD NO. 02-01903

UNITED PARCEL SERVICE,
HON. MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE
AND WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant sustained a work-related injury but refused to award future medical benefits. The Workers' Compensation Board and the Court of Appeals affirmed, and we affirm. Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), explains that a work-related harmful change may be temporary and require only a limited period of medical treatment. The ALJ did not err because a finding that the claimant's low back injury resolved supported the legal conclusion that it warranted no future medical treatment.

The claimant worked as an airplane pilot. On December 3, 2000, his left foot slipped on the icy stairs of his plane and he grabbed the handrail with his left hand to keep from falling. He continued to work and sought no medical treatment until February

2001. In May 2003 he testified that he continued to be treated for neck, left shoulder, left arm, and left thoracic pain as well as hip pain. He stated that he took over-the-counter medication as needed and that heavy lifting aggravated his condition. He also stated that Dr. Murphy had scheduled Botox injections for the left side of his back.

The record indicates that the claimant first sought medical treatment for his injury on February 7, 2001, from Dr. Young. He reported that he had strained his lower back when he slipped two months earlier. Noting that the claimant's activity tolerance, posture, and gait were normal and that his range of motion was intact without significant guarding, Dr. Young diagnosed low back pain of a musculoskeletal nature. He advised normal activity and imposed no work restrictions. On March 5, 2001, Dr. Young's assessment was low back pain that had resolved and normal activity tolerance. On June 20, 2001, his assessment remained the same. He noted that over-the-counter analgesics relieved any symptoms. A note printed on November 29, 2001, indicated that the claimant was seen for a follow-up regarding low back pain and pain in the left trapezius and paraspinal muscles.¹ Treatment notes mention thoracic back pain and tenderness over the left latissimus and scapula sometime in 2002. Dr. Young referred the claimant eventually to Dr. Murphy for pain management.

Dr. Gill, an osteopath, performed a peer review analysis. Her January 2002 report noted that the claimant's diagnosis was low back pain and that his physician recommended home exercise and over-the-counter medications. Noting that the claimant continued to play golf, she inferred that his level of pain probably was not

¹ The employer's brief and Court of Appeals' opinion refer to a note from November 15, 2001, stating that the claimant reported pain in the trapezius and paraspinal muscles after playing golf. Although this is the earliest mention of such pain, the note does not appear to have been part of the record before the ALJ.

severe. Based on his physician's notes, she concluded that his hip and back were at maximum medical improvement (MMI) and required no further work-up or procedures.

Dr. Murphy first saw the claimant on March 7, 2002. He noted pain in the left lower back that radiated into the hip, pain in the left neck and shoulder, and cervical spondylosis. The claimant had a normal range of motion in the neck and in the thoracic and lumbar spine. He had no tenderness or pain with straight leg raising. Dr. Murphy planned a series of trigger point injections, and his associate prescribed a TENS unit. An October 2002 MRI revealed disc protrusions at C5-6 and C6-7 but no evidence of neural compression. A November 2002 EMG showed left ulnar neuropathy at the elbow but no evidence of left median neuropathy or cervical radiculopathy. A December 2002 whole-body bone scan was negative. On March 27, 2003, Dr. Murphy stated that the claimant was not at MMI and needed to be evaluated after receiving Botox injections.

A December 2003 MRI revealed a small disc herniation at L5-S1, with findings suggesting some dessication. A shoulder MRI showed mild degenerative osteoarthritic changes in the acromioclavicular joint. Although it suggested an anterior glenoid labrum tear, there was no obvious evidence of a rotator cuff tear. A thoracic MRI was normal.

Dr. Wood performed an independent medical examination in December 2004 at the employer's request. In his opinion, the claimant sustained a traction injury to his left upper extremity and left side of his back when he slipped and caught himself. Dr. Wood thought that there was a causal relationship between the current complaints and the injury. He would advise the claimant to continue a home exercise program to

strengthen the lower back and left shoulder girdle and to use acetaminophen and/or over-the-counter non-steroidal medication for flare-ups of low back pain. He also noted that massage treatment would relieve the claimant's symptoms.

Dr. Baker performed an independent medical evaluation in July 2005 at the request of the claimant's attorney. He diagnosed chronic cervical strain, chronic left rhomboid strain, thoracic strain, chronic lumbar strain, and a traction injury to the left ulnar nerve near the elbow. He found nothing to warrant surgery. In his opinion, the claimant was at MMI and had no permanent impairment rating for the cervical, thoracic, or lumbar spine or for the left shoulder. He stated that if a repeat EMG were to be positive, an impairment rating for peripheral neuropathy might be warranted. He thought that the best treatment would be to continue a daily program of stretching and muscle strengthening for all of the affected areas.

When the claim was heard, the employer had paid \$14,515.01 in medical expenses voluntarily. The ALJ found the claimant to be credible regarding his accident and determined that he sustained an injury. Addressing his entitlement to future medical benefits, the ALJ noted that KRS 342.020 requires employers to pay for the treatment, cure and relief of the effects of an injury but that treatment must be reasonable, necessary, and related to the injury to be compensable. The ALJ found most convincing the medical evidence that any injury the claimant suffered in the December 2000 incident was not permanent and had resolved. Thus, the ALJ concluded that no further medical treatment was reasonable or necessary.

In a petition for rehearing, the claimant argued that the finding that he sustained an injury entitled him to reasonable medical treatment in the future. The ALJ denied

the petition. The order noted that although the claimant sustained an injury, no future medical treatment was reasonable or necessary for an injury that had resolved.

The claimant asserts that the ALJ erred as a matter of law by denying future medical benefits. He asserts that Robertson v. United Parcel Service, supra, is inapplicable because the ALJ found that he sustained an injury rather than a temporary exacerbation of a pre-existing condition. Relying on Combs v. Kentucky River District Health Department, 194 S.W.3d 823 (Ky.App.2006), he argues that the lack of a permanent impairment rating does not preclude future medical benefits. Asserting that no evidence indicated that his injury had resolved or that future medical treatment was inappropriate, he argues that the claim must be remanded for the entry of an award.

KRS 342.020(1) entitles a worker to reasonable and necessary medical treatment at the time of the injury and thereafter during disability. In FEI Installation, Inc. v. Williams, 214 S.W.3d 313, 318 (Ky. 2007), the court explained that "disability" is the equivalent of impairment for the purposes of the statute, regardless of whether impairment rises to the level that warrants a permanent impairment rating, permanent disability rating, or permanent income benefits. Using the Fifth Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment, the court defined impairment as being a "loss, loss of use, or derangement of any body part, organ system, or organ function" and noted that it may be temporary or permanent. Relating the definition of impairment to the definition of "injury" found in KRS 342.0011(1), the court stated that impairment demonstrates the existence of a harmful change in the human organism.

Contrary to the claimant's assertion, Robertson v. United Parcel Service, supra,

makes it clear that when work-related trauma causes temporary symptoms requiring medical treatment, a harmful change has occurred. Thus, the worker has sustained an injury as defined by KRS 342.0011(1) and is entitled to whatever income and medical benefits the evidence supports. Robertson explains that a temporary harmful change warrants only a limited period of medical benefits and may or may not warrant temporary total disability benefits.

As the party claiming an entitlement to future medical benefits, the claimant had the burden to prove that his December 2000 injury caused a harmful change that was permanent or required some additional medical treatment. For nearly a year after the injury, his sole complaints concerned his low back. He first sought treatment for low back pain in February 2001 from Dr. Young, who noted in March and June of that year that the injury had resolved. None of the other testifying physicians saw the claimant until more than a year after the work-related injury. The ALJ found that the injury involved the low back and that it had resolved. The findings were supported by substantial evidence in the record, and they provided a proper basis for the legal conclusion that KRS 343.020(1) authorized no future medical treatment. Nothing indicated that the ALJ thought the absence of a permanent impairment rating for the injury precluded future medical benefits.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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