

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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-000832-WC

DATE 2-21-08 EnA Groum, D.C.
APPELLANT

GARY CLARK

V. ON APPEAL FROM COURT OF APPEALS
CASE NUMBER 2005-CA-001504-WC
WORKERS' COMPENSATION NOS. 03-02236 and 03-77867

ELMO GREER & SONS;
HON. JOHN W. THACKER,
ADMINISTRATIVE LAW JUDGE;
AND KENTUCKY WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

An Administrative Law Judge (ALJ) awarded medical and permanent income benefits for the claimant's work-related neck and shoulder injuries but refused to award benefits for the alleged lower back injury because the evidence showed no increase in his lower back impairment. The ALJ also refused to award temporary total disability (TTD) benefits because the claimant failed to prove the date of maximum medical improvement (MMI). The Workers' Compensation Board and the Court of Appeals affirmed. We affirm concerning the date of MMI, but because the evidence compelled a finding that the accident caused a harmful change to the claimant's distal sacrum, we reverse concerning the alleged lower back injury and remand for an appropriate award of medical benefits.

The claimant was born in 1948 and quit school during his sophomore year. He received benefits for a 40% occupational disability after fracturing the L1 vertebra in 1985. Medical evidence indicated that the fracture warranted a whole-body functional impairment rating of from 5% to 14%. The claimant testified subsequently that he had recovered completely. He also testified that he fractured his skull, ribs, and jaw in 1975 and injured his head on two other occasions. He began working for the defendant-employer as a heavy equipment operator in 2000.

On July 21, 2003, the claimant was bending over to put ice in his lunch bucket when he was hit in the buttocks by a truck driven by one of his co-workers. He was taken by ambulance to the emergency room at Appalachian Regional Healthcare, complaining of pain in the right flank and in right lower quadrant of the abdomen. Emergency room records indicated that the vehicle hit him in the buttocks, throwing him forward, and that he had abrasions over the right ribs and buttocks. A physician ordered a back brace and various medications as well as x-rays of the cervical spine; the pelvis; the right ribs, hip and femur; and the lumbar spine. Among other things, the x-rays revealed a compression fracture at L1, which was thought to be acute until the claimant reported that he had sustained such a fracture in a 1985 work-related accident. The physician diagnosed a lumbar sprain/strain and released the claimant to follow up with Dr. Nadar.

On July 22, 2003, the claimant reported to Pikeville Methodist Hospital, giving a history of the previous day's accident. He complained of increased pain in his right ribs and pain with deep respiration. Additional x-rays were taken, after which the physician diagnosed a compression fracture of L1 but was uncertain if it was old or new. The

claimant was prescribed pain medication and released.

Dr. Nadar began treating the claimant on July 24, 2003, at which time he complained of pain in his neck, back, and the left side of his chest and of pain going down his leg. He exhibited a full range of motion in the cervical spine and shoulder, but his lumbar range of motion was limited secondary to pain. Dr. Nadar ordered a bone scan, which was performed on August 14, 2003. It revealed abnormalities in the distal (lower) sacrum that were "compatible with a probable healing fracture site." An MRI of the lumbar spine, performed on August 27, 2003, revealed a compression fracture of L1, which appeared to be an old injury, and mild bulging of the discs at L2-3 and L3-4. On September 30, 2003, the claimant exhibited signs of cervical radiculopathy, and MRI of the cervical spine revealed a mild, centrally located, herniated disc at C6-7. A right shoulder MRI performed on December 23, 2003, also revealed some abnormalities.

Dr. Nadar saw the claimant again on March 15, 2004, and prepared a Form 107 report. He diagnosed cervical and lumbo-sacral strains, right shoulder strain tendonitis, and a contusion to the chest, and he attributed the conditions entirely to the work-related accident. Dr. Nadar assigned a 5% permanent impairment rating under DRE cervical category II; a 5% rating under DRE lumbar category II, characterizing it as lumbosacral; and a 3% rating for the right upper extremity. He also assigned various restrictions and stated that the claimant did not retain the physical capacity to return to the type of work performed at the time of injury.

Dr. Scott performed a neurosurgical evaluation in November and December, 2003, at which time the claimant continued to complain of neck, lower back, and right shoulder pain. Dr. Scott ordered x-rays of the cervical, lumbar, and sacral spine. After

reviewing the claimant's history and previous diagnostic studies, he noted that MRI revealed an old, minimal wedge compression fracture of L1 and some lumbar disc dessication but no herniation or stenosis. He also noted that the MRI included the sacrum down to the S2 segment and revealed no abnormality. However, he also noted that a bone scan revealed "hot spots" in the sacrum. Dr. Scott diagnosed neck and lower back pain that were consistent with a sprain/strain injury and spondylosis. He also diagnosed a right shoulder injury, with decreased range of motion and pain upon movement.

Records from the Lake Cumberland Regional Hospital indicated that the claimant presented for physical therapy from November 24 through December 23, 2003, with a diagnosis of sciatica and lumbar pain. The report of a right shoulder MRI taken on December 23, 2003, indicated that there was an increased signal within the AC joint. Although there was no evidence of a rotator cuff tear, there was focal thickening of the lateral rotator cuff which might be related to the direct fall on the right shoulder. It was thought that conservative therapy might suffice.

Dr. Wagner examined the claimant on March 24, 2004, and reviewed the diagnostic studies, including the bone scan performed in August, 2003. The chief complaints at that time were: bilateral buttock pain, lower back pain, neck pain that went into the right shoulder, intermittent numbness in the right thumb, right anterior thigh pain when sleeping, and occasional numbness in the right heel when driving. Neurological examinations of the cervical spine, upper extremities, lumbar spine, and lower extremities were normal. In his opinion, the cervical MRI findings were consistent with the normal aging process and were not caused by the work-related accident. The

changes noted on lumbar MRI were pre-existing. Stating that the claimant was at MMI, he assigned a 0% permanent impairment rating under DRE cervical category I and a 0% permanent impairment rating under DRE lumbar category I. In his opinion, the claimant could return to work without restrictions.

The employer refused to pay any medical or income benefits voluntarily, asserting that the accident was not work-related under the "going and coming" rule. However, the claimant maintained that the accident was work-related and caused injuries to his back, legs, neck, and shoulders as well as a psychological injury that is no longer at issue. The ALJ concluded that the accident was work-related and, relying on Dr. Nadar, found that it resulted in permanent impairment ratings of 5% for the neck injury and 3% for the shoulder injury. Although acknowledging that Dr. Nadar assigned a 5% permanent impairment rating due to a low back injury, the ALJ relied on Dr. Wagner's opinion that the changes noted on lumbar MRI were pre-existing. Thus, the ALJ found that the accident caused no additional low back impairment and refused to award benefits for a low back injury. Unconvinced that the claimant reached MMI at any time other than July 22, 2003, the ALJ ordered partial disability benefits to begin on that date.

Among other things, the claimant's petition for reconsideration acknowledged that the L1 fracture was old but pointed out that the bone scan performed in August, 2003, revealed abnormalities that were compatible with a healing fracture to the lower sacrum. The claimant asserted that he was entitled to medical benefits for treating the injury even if it caused no permanent impairment and requested specific findings on the matter. The ALJ denied the petition summarily.

The claimant continues to assert that he is entitled to a TTD award. Under KRS 342.0011(11)(a), a worker is eligible for TTD if he has not reached MMI and has not reached a level of improvement that would permit a return to employment. It was the claimant's burden to prove every element of his claim, including the date on which he reached MMI. The Fifth Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment describes MMI on page 19 as follows:

An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often termed the date of maximal medical improvement (MMI). It is understood that an individual's condition is dynamic. [MMI] refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once an impairment has reached MMI, a permanent impairment rating may be performed.

Although the claimant asserts that he reached MMI no earlier than March 15, 2004, when Dr. Nadar prepared the Form 107 and assigned permanent impairment ratings, he offered no affirmative evidence to that effect. The fact that a physician fails to assign a permanent impairment rating until a particular date may imply either: 1.) that MMI did not occur until that date; or 2.) that MMI occurred no later than that date. Absent affirmative medical evidence to the contrary, the ALJ could find reasonably infer that MMI occurred no later than March 15, 2004, and that the claimant failed to prove a date after July 22, 2003.

KRS 342.0011(1) defines a compensable injury as being a work-related traumatic event that proximately causes a harmful change in the human organism as evidenced by objective medical findings. Gibbs v. Premier Scale Company/Indiana Scale Company, 50 S.W.3d 754 (Ky. 2001), explains that the term "objective medical

findings" does not include symptoms that an injured worker reports. It includes clinical findings, observations, and other standardized testing performed as part of a physical examination as well as sophisticated diagnostic tests. The court pointed out in Roberts Brother Coal Company v. Robinson, 113 S.W.3d 181 (Ky. 2003), and in Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), that a worker may be entitled to some medical benefits for an injury that warrants no permanent impairment rating or award of permanent income benefits. In FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), the court determined that a worker may be entitled to future medical benefits for an injury that warrants no permanent impairment rating.

It is undisputed that the claimant was hit in the buttocks by a motor vehicle and taken to the emergency room by ambulance with abrasions to the buttocks and complaints that included low back pain. He was evaluated and treated there for low back pain. A bone scan shortly thereafter revealed abnormalities that were "compatible with" a healing fracture of the distal sacrum. Noting the results of the bone scan, Dr. Nadar diagnosed a lumbo-sacral strain, and Dr. Scott diagnosed a lower back sprain or strain injury. Dr. Wagner stated that the changes found on lumbar MRI were pre-existing, but nothing indicated that the test included the distal sacrum. In fact, Dr. Scott noted that it showed the sacrum only down to the S2 segment. Although Dr. Wagner reviewed the findings from the bone scan, he failed to comment on them. Therefore, because no evidence refuted the bone scan or indicated that the abnormalities in the distal sacrum were pre-existing or due to something other than the work-related accident, the evidence compelled a finding that the accident caused the harmful change, in other words, that it caused an injury.

Under KRS 342.020(1), an employer is liable for medical expenses reasonably required at the time of injury and thereafter during disability. The evidence does not compel a finding that the sacral abnormalities warranted a permanent impairment rating or an award of income benefits, but the absence of a permanent impairment rating would not preclude an award of medical benefits. In this case, the employer refused to pay any medical expenses for treating the harmful changes caused by the work-related accident. On remand, the ALJ may be convinced reasonably that the sacral injury warrants only limited medical benefits, but it clearly warrants at least some medical benefits.

The decision of the Court of Appeals is affirmed in part and reversed in part, and this claim is remanded to the ALJ for further consideration.

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

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ORDER DENYING PETITION FOR REHEARING AND ORDER MODIFYING OPINION

Appellant's petition for rehearing of the September 20, 2007, Memorandum Opinion of the Court is DENIED. Further, on the Court's own motion, the Memorandum Opinion of the Court rendered September 20, 2007, is modified on its face by substitution of the attached pages 1, 4, and 8 in lieu of pages 1, 4, and 8 of the opinion as originally rendered. Said modifications do not affect the holding of the case.

All sitting. All concur.

Entered: February 21, 2008.


CHIEF JUSTICE