

**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**NOT TO BE PUBLISHED OPINION**

**THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**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

2007-SC-000514-WC

DATE 5-15-08 E.H.A. Gray: H.P.C.

PEPSI COLA

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS  
2006-CA-002401-WC  
WORKERS' COMPENSATION BOARD NO. 00-93535

JEFFREY LEON BUTLER;  
WORKERS' COMPENSATION BOARD;  
AND HON. HOWARD FRAZIER,  
ADMINISTRATIVE LAW JUDGE

APPELLEES

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

At the reopening of this settled claim, an Administrative Law Judge (ALJ) awarded additional income benefits for the claimant's physical injury and awarded income and medical benefits for a newly-raised psychological condition. The Workers' Compensation Board (Board) affirmed, rejecting arguments that the claimant failed to show a greater permanent impairment rating from the physical injury and that the psychological claim was time-barred under Slone v. Jason Coal Co., 902 S.W.2d 820 (Ky. 1995). The Court of Appeals affirmed. We affirm because the ALJ based the factual findings on substantial evidence and a correct interpretation of the law.

The claimant worked for the defendant-employer as a full-service route salesperson. He fell and fractured his coccyx on February 9, 2000, while attempting to

remove product from the back of his truck. He also suffered a non-work-related heart attack in October 2000, which required surgery. After recovering, he returned to work in January or February 2001 as a merchandiser, a job with less physical demands.

The claimant filed an application for benefits based on the fractured coccyx. In November 2000 Dr. Goldman assigned a 5% permanent impairment rating to the fracture using the DRE method and limited the claimant to lifting no more than 50 pounds and no more than 25 pounds repetitively. In July 2001 Dr. Whobry noted that the claimant described his pain at six on a scale of ten, that it increased with activity, and that he felt depressed and had difficulty sleeping. She restricted the claimant from heavy lifting and assigned an 8% permanent impairment rating under the DRE method, attributing a 5% rating to the injury, itself, and a 3% rating to the impact of the injury on activities of daily living. The claimant testified in July 2001 that he felt anxious and depressed and took "nerve pills" due to his pain and inability to do what he once did, but he raised no psychological claim. He stated that he had last seen his cardiologist in June 2001 and had no heart-related symptoms. The parties settled the claim on October 8, 2001 for a lump sum of \$15,000.00 that was based on a 7.7% disability.

The claimant filed a motion to reopen on March 3, 2005. His supporting affidavit stated that his physical condition had worsened since the settlement and that he had developed depression due to chronic, severe pain. Medical reports attached to the motion indicated that Dr. Petruska assigned an 8% permanent impairment rating in August 2004 but changed it to a 12% rating in October 2004, using the Range of Motion method. The Chief ALJ granted the motion, after which the parties took further proof.

The claimant testified that he quit his job as a sales support supervisor on July

21, 2004, due to increased back pain and fatigue. He stated that his cardiologist restricted him to working 40 hours per week and that the employer had no such work available. He asserted that he was totally disabled but acknowledged that he did not look elsewhere for work.

Questioned about his medical condition, the claimant stated that he received no treatment for his back between the settlement and August 2004, when he returned to Dr. Petruska. He testified that his primary care physician, Dr. Law, began to treat him for depression in 2004. He began to see a psychologist, Dr. Urey, in 2005. He did not recall seeing a physician specifically for depression before 2004. Nor did he recall taking antidepressant medication or testifying in 2001 that he suffered from anxiety and depression. He complained presently of back pain that radiated into both his legs and mid-back, of a sleep disturbance, and of a lack of desire to do anything.

Medical evidence submitted at reopening included a report from Dr. Sadlo, the claimant's cardiologist, who noted in June 2004 that he was having difficulty at work. The claimant requested that he be limited to an eight-hour day and forty-hour week, which Dr. Sadlo thought reasonable. Dr. Sadlo noted on July 21, 2004 that the claimant was being treated for depression due to his medical conditions and difficulties keeping up with his work. He took the claimant off work and recommended vocational rehabilitation.

Dr. Petruska, a neurosurgeon, assigned an 8% permanent impairment rating on August 30, 2004. On October 6, 2004, he assigned a 12% permanent impairment rating, using the Range of Motion model. He restricted the claimant to limited sedentary work and noted that emotional factors contributed to the severity of the claimant's

symptoms and functional limitations.

When deposed, Dr. Petruska stated that the claimant complained of increased back pain and difficulty walking when he returned for treatment in August 2004. Although no radiographic or neurological evidence showed a worsening of condition that warranted additional surgery, Dr. Petruska noted evidence of significant emotional distress that he thought might have exacerbated or increased the physical symptoms. Thus, he recommended pain management and/or psychological treatment. He stated that the presence of an injury and degenerative disc disease supported the use of either the DRE or Range of Motion method for rating the spine impairment. He obtained a 12% rating using the Range of Motion method.

A May 17, 2005 report from Dr. Urey, a psychologist, stated that the claimant was referred by his primary care physician for treatment of depression. He had made minimal progress and was "quite depressed over the change in his physical well-being" and his inability to support his family. Additional stressors included a relative's cancer diagnosis and his wife's surgery early in 2005.

When deposed by the employer, Dr. Urey testified that the claimant reported suffering some degree of depression shortly after the injury but stated that it worsened after he quit working in July 2004. Dr. Urey attributed the present symptoms to the claimant's inability to support his family. He stated that he would have characterized the condition that existed immediately after the injury as being an adjustment disorder with depression. The present diagnosis was major depression that resulted from a "loss of functioning from his injury" and the heart attack, which "added insult to injury."

The claimant submitted a May 2005 report from Dr. Embry, who noted a history

of "progressive depression" since the work-related injury. The report indicated that the claimant related the depression to the injury, his heart attack, and his inability to work and earn what he had before the injury. Dr. Embry diagnosed major depression, single episode, severe, without psychotic features. He assigned a GAF of 41-50 and a psychological impairment of 55%-75%.

Dr. Gleis evaluated the claimant for the employer in August 2005. He found no significant evidence of malingering and diagnosed lumbosacral strain, a non-displaced and resolved coccygeal fracture, thoracic pain without evidence of injury, and bilateral lower leg symptoms of unknown etiology. He assigned a 5%-8% permanent impairment rating using the DRE method. Dr. Gleis explained that the 8% rating included subjective complaints, which he attributed to cardiac fatigue and depression, and also included the effects of the claimant's symptoms on activities of daily living. He stated that he would assign a 5% rating if the claimant received a separate rating for the cardiac or psychological condition. Dr. Gleis characterized the claimant's condition as lumbar degenerative disc disease without a surgically correctable pathology and stated that no objective evidence indicated that it had worsened since 2001.

When deposed by the claimant, Dr. Gleis testified that the DRE method is appropriate for determining the claimant's permanent impairment rating because he sustained an injury. He explained that the Range of Motion method can be appropriate when multiple spinal levels are affected but that multi-level degenerative disc disease does not support the use of the method. Thus, he used the DRE method.

The claimant filed an MRI report, dated October 15, 2005, which showed multi-level disc protrusions and mild spinal stenosis.

Dr. Cooley, a psychiatrist, evaluated the claimant for the employer. He reported in October 2005 that the claimant denied any history of depression before the work-related injury. He gave a history of being worried about whether and when he would return to work during the first year after the injury but indicated that he felt better after recovering from the heart attack. When his health began to decline, he began to be depressed again. Thus, Dr. Law began to prescribe medication for depression in April or May 2004 as well as psychotherapy. Dr. Cooley diagnosed major depression-moderate, personality disorder, chronic pain disorder, sleep apnea, and coronary artery disease. He assigned a 10% permanent impairment rating based on depression, attributing a 4% rating to the injury and a 6% rating to sleep apnea and coronary artery disease. He also reported that the depression began before October 2001 based on Dr. Whobry's report and the claimant's deposition testimony from the initial proceeding. He noted that the claimant attributed 95% of his problems to pain from the injury and did not report that his psychiatric/emotional problems precluded him from performing any of his previous work.

After conducting an exhaustive review of the lay and medical evidence, the ALJ determined that the permanent impairment rating for the claimant's spine injury increased from 5% to 8% and awarded additional partial disability benefits. The ALJ determined also that Slone v. Jason Coal Co., supra at 821, did not require the psychological claim to be dismissed, reasoning that "the prescription for a few nerve pills by Dr. Petruska in 2001" was insufficient to show that a claim for depression had accrued at that time. Relying on Dr. Embry, the ALJ found that the condition warranted a 55% psychological impairment, that a 40% psychological impairment resulted from

the injury, and that the psychological impairment translated into a 22% permanent impairment rating for the purpose of awarding benefits.

American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Commission, Ky., 379 S.W.2d 450, 457 (1964), explains that judicial review of an administrative decision is limited to determining whether the decision was erroneous as a matter of law. KRS 342.285 designates the ALJ as the finder of fact; thus, the Board and reviewing courts may not reweigh the evidence regarding a question of fact. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986), explains that the inquiry concerning a factual finding is whether the decision was based on substantial evidence or whether it was so unreasonable under the evidence that it must be viewed as being erroneous as a matter of law. When a mixed question of fact and law is at issue, the inquiry includes whether the ALJ applied the correct legal standard to the evidence. The court has greater latitude in such instances as noted in Purchase Transportation Services v. Estate of Wilson, 39 S.W.3d 816, 817-18 (Ky. 2001).

### **I. Physical Condition**

The employer asserts that the evidence did not support an increased award for the spine injury. It notes that 5% and 8% permanent impairment ratings were assigned in the initial claim and that Dr. Gleis assigned 5% and 8% permanent impairment ratings at reopening but also stated that the claimant's condition did not worsen. Moreover, the claimant quit working after his cardiologist imposed restrictions rather than as a consequence of his injury.

The claimant's initial award was the product of a settlement. KRS 342.125(7) provides that no statement contained in a settlement agreement is an admission



against a party's interests at reopening. Thus, Beale v. Faultless Hardware, 837 S.W.2d 893, 896 (Ky. 1992), explains that an ALJ must determine the worker's actual disability at settlement before considering whether the disability has increased at reopening.

In the initial claim, Dr. Goldman assigned a 5% permanent impairment rating and Dr. Whobry assigned an 8% rating. The ALJ relied on Dr. Goldman, which was reasonable under the evidence.

Dr. Petruska assigned an 8% permanent impairment rating in August 2004. He used the Range of Motion method to assign a 12% rating five weeks later. Dr. Gleis stated that the Range of Motion method was not appropriate for the injury and assigned a 5% to 8% permanent impairment rating. He stated that the 8% rating included subjective complaints and that he would assign a 5% rating if the claimant received a separate rating for the cardiac or psychological condition. The ALJ determined that Dr. Gleis was more credible concerning the appropriate method and found the permanent impairment rating to be 8%. The ALJ reasoned that Dr. Gleis found no significant evidence of malingering and assigned the rating under DRE lumbar category II despite his statement that a 3% rating resulted from subjective complaints. Noting the claimant's credible testimony of worsening lumbar complaints since the settlement, the ALJ determined that the 3% rating represented a worsening of his condition. Although the evidence would not have required a decision for the claimant had one not been made, the record contains substantial evidence to render it reasonable.

## **II. Psychological Condition**

The employer asserts that the ALJ misapplied the law when finding that the

claimant raised his psychological claim in a timely manner. It reasons that KRS 342.185(1) requires a claim to be filed within two years of the date of accident or last voluntary payment of temporary total disability benefits. Moreover, KRS 342.270(1) requires all known causes of action to be joined during the pendency of the claim or forever barred. Noting the claimant's July 2001 testimony concerning depression and anxiety, the employer argues that he knew or should have known that the conditions resulted at least partially from the work-related accident. It concludes, therefore, that Slone v. Jason Coal Co., *supra*, controls the outcome regardless of the fact that he did not file a social security disability claim before the October 2001 settlement.

In Slone v. Jason Coal Co., *supra*, the worker filed workers' compensation and social security disability claims at about the same time in 1987. Both in 1987 and at reopening, occupational disability was determined under the Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968), standard. Slone submitted a psychiatric evaluation in the social security disability claim and was granted disability benefits. Yet, he failed to submit evidence of the condition when litigating the workers' compensation claim. At reopening, he alleged that the condition had been dormant at the time of the initial award and had only recently become disabling. The Court determined, however, that the attempt to claim benefits for the condition by means of a subsequent reopening amounted to piecemeal litigation, which Wagner Coal & Coke Co. v. Gray, 208 Ky. 152, 270 S.W. 721 (1925), prohibited. Thus, a motion to reopen could not be based on a condition that was known during the pendency of the initial claim but not litigated.

The ALJ did not misapply Slone v. Jason Coal Co., *supra*. The present claim arose under the 1996 Act. KRS 342.0011(1) defines an injury as being a work-related

traumatic event that is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. It also requires a psychological, psychiatric, or stress-related change to result directly from a physical injury. Gibbs v. Premier Scale Co., 50 S.W.3d 754 (Ky. 2001), and Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001), explain that the term "objective medical findings" does not include a physician's diagnosis unless it is supported by direct observation and/or objective or standardized testing. The term includes symptoms that support a diagnosis if their existence is documented by a physician's direct observation and/or testing.

The claimant acknowledged in the initial proceeding that he felt depressed and took "nerve pills" due to his pain and inability to do what he once did. Dr. Whobrey's report concerning his physical injury also noted that he felt depressed and had difficulty sleeping. Nonetheless, the employer points to no objective medical findings to support a legal conclusion that the claimant suffered from depression as a direct result of his physical injury when the parties settled the initial claim. Nor does it point to evidence that the claimant underwent a psychological evaluation or asserted a claim based on psychological disability in another forum. It has failed to show that the ALJ erred in finding that no claim for a psychological injury accrued until after the settlement and that the claimant raised the injury in a timely manner.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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