

**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**NOT TO BE PUBLISHED OPINION**

**THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**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-000883-WC

DATE 9-11-08  
E.A. Grouse, DC

HARDEE'S FOOD SYSTEMS

APPELLANT

V.  
ON APPEAL FROM COURT OF APPEALS  
2007-CA-000997-WC  
WORKERS' COMPENSATION BOARD NO. 05-69621

GAIL ALLEN,  
HON. LAWRENCE F. SMITH,  
ADMINISTRATIVE LAW JUDGE, AND  
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) awarded the claimant permanent income and medical benefits for a cumulative trauma injury to her back and refused to exclude pre-existing active disability from the award. The Workers' Compensation Board (Board) and the Court of Appeals affirmed. Appealing, the employer argues that the injury was no more than a temporary exacerbation of pre-existing back conditions and that it warranted only temporary benefits as in Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001). The claimant asserts that the appeal is frivolous and requests sanctions under KRS 342.310 or CR 73.02(4).

We affirm. Although the record contained evidence that would have permitted a different result, the decision was reasonable and may not be reversed. We decline the

request for sanctions under KRS 342.310 or CR 73.02(4) because we are not convinced that the employer appealed without reasonable grounds or that the appeal is so lacking in merit as to imply bad faith.

The claimant began working in the defendant-employer's restaurant in 1979, eventually became a general manager, and held that position for approximately 20 years. She testified that the job required her to lift up to 60 pounds and also required extensive bending and stooping to reach items near the floor, including the safe. She stated that she moved about on the restaurant's tiled concrete floors for ten hours per day, sometimes longer, and had experienced some muscular back pain after activities such as unloading the supply truck.

The claimant testified that she sought treatment for back pain in 2002 and 2004 but that "most of the treatment started [in October 2005] when I . . . really started experiencing pain." She explained that she experienced sharp pain in her lower back and into her leg on October 7, 2005, while bending over to get change from the safe. She left work early that day to rest her back, informed her supervisor on the following day, and then left work at mid-day due to her pain. The claimant saw her family physician, Dr. Dixon, two days later, and did not return to work until early December 2005. She stated that Dr. Dixon did not tell her that her work caused her degenerative disc disease to become disabling until December 2, 2005. She later alleged a cumulative trauma injury to her back that became manifest on October 7, 2005; that she learned was due to her work on December 2, 2005; and that ended when she resigned for other reasons on May 15, 2006.

Dr. Dixon's treatment notes indicated that he had treated the claimant for foot

and leg pain in 1999. He treated her for low back pain in April and May 2002 as well as in March and June 2004. MRI performed in October 2004 revealed no focal disc herniation but did reveal abnormalities, among which was bulging at L4-5 that possibly irritated the L5 nerve root. On October 10, 2005, Dr. Dixon noted that the claimant had injured her back at work and experienced pain that extended to the right calf. He also noted that she had sustained multiple traumas at work but that the most recent incident was more severe. Based on a December 15, 2005, MRI, he diagnosed a traumatic herniated nucleus pulposus at L4-5 with L5 nerve root compression and neuropathy, all of which he attributed to the claimant's injury. He assigned a 10-13% permanent impairment rating, stating that she had no active impairment before the injury. Although he imposed various work restrictions, he thought that she retained the physical capacity to return to the type of work that she performed at the time of the injury.

Dr. Ballard evaluated the claimant for the employer and was deposed. In her opinion, MRI films from 2005 were unchanged from those taken in 2004. Physical examination revealed no pain to palpation, no muscle wasting or atrophy, inconsistent findings with straight leg raising, and a normal neurological exam. Dr. Ballard found the claimant's complaints to be disproportionate to the objective findings. She diagnosed mild degenerative disc disease and pseudoarthrosis of the lumbar spine with chronic back pain, all of which she attributed to the claimant's age, obesity, and congenital spinal conformation rather than a work-related injury. She stated that the claimant's low back condition was active before the alleged injury, basing the statement on medical records noting complaints of back pain as early as September 1999 and the presence of pseudoarthrosis in March 2004. Dr. Ballard assigned a 7% permanent impairment

rating, stating that all of it existed before October 2005.

Convinced that the claimant "was not the kind of employee to manufacture an injury allegation for extraneous reasons," the ALJ found her testimony and Dr. Dixon's to be most convincing. The ALJ concluded that she sustained "a work-related injury which manifested itself on October 7, 2005, and ultimately manifested itself as cumulative trauma on December 12, 2005." Noting the prior complaints of low back pain, the claimant's testimony that the pain did not interfere with her work, and also Dr. Dixon's statement that she had no prior active impairment, the ALJ refused to exclude any prior active disability. As a consequence, the claimant received a period of temporary total disability benefits followed by a permanent partial disability that was based on the 10% permanent impairment rating that Dr. Dixon assigned. The ALJ denied the employer's petition for reconsideration, which argued that the claimant's condition was pre-existing and actively disabling before October 2005.

The claimant had the burden to prove every element of his claim. KRS 342.285 designates the ALJ as the finder of fact, which gives the ALJ the sole authority to determine the credibility of witnesses, draw reasonable inferences, and weigh conflicting evidence.<sup>1</sup> Thus, it prohibits a reweighing of the evidence on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986), explains that when the party with the burden of proof satisfies the fact-finder, the issue on appeal is whether substantial evidence supported the decision, in other words, whether it was reasonable. If a decision is reasonable, it is immaterial that the record contains evidence that would

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<sup>1</sup> Square D Co. v. Tipton, 862 S.W.2d 308, 309 (Ky. 1993); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

have permitted a different decision.<sup>2</sup> The evidence in this case would have permitted but did not compel a decision for the employer.

The employer asserted that the incident on October 7, 2005, exacerbated a pre-existing back condition; that it caused only a temporary injury; and that it resolved before the claimant's return to work in December 2005. Although Dr. Ballard's testimony would have supported such findings, the ALJ rejected the employer's theory of the case. Finding Dr. Dixon's testimony to be more persuasive, the ALJ determined that the claimant sustained a cumulative trauma injury that manifested itself on October 7, 2005, although the claimant did not learn that she sustained a work-related cumulative trauma injury until December 2005. The ALJ construed Dr. Dixon's testimony as indicating that the claimant sustained multiple traumatic events in her work that together with the event in October 2005 produced a herniated disc and nerve root compression. He also indicated that she had no active impairment before the injury and attributed her entire permanent impairment rating to work-related trauma. His testimony provided adequate support for the decision in the claimant's favor. Thus, the Board and the Court of Appeals did not err in affirming it.

The claimant asserts that the employer's appeal is frivolous and requests sanctions under KRS 342.310 or CR 73.02(4), a request that we decline. Although we have affirmed the Court of Appeals' decision, the record contains evidence that would have permitted a decision in either party's favor. We are not convinced that the employer appealed without reasonable grounds or that the appeal is so lacking in merit as to imply bad faith.

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<sup>2</sup> Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999); McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

The decision of the Court of Appeals is affirmed.

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

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RENDERED: AUGUST 21, 2008  
TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2008-SC-000017-MR

DATE 9-11-08 EIA Group PC.

THE MEDICAL VISION GROUP, P.S.C.,  
AND SCHATZIE, L.L.C.

APPELLANTS

V.

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DM COURT OF APPEALS  
ER 2007-CA-001759-OA  
IT COURT NO. 03-CI-00442

HON. TIMOTHY N. PHILPOT, JUDGE  
FAYETTE CIRCUIT COURT

AND

CHARLENE THERESA DUDEE,  
JITANDER SINGH DUDEE, AND  
JAMES W. GARDNER, IN HIS  
CAPACITY AS RECEIVER  
(REAL PARTIES IN INTEREST)

APPELLEES

**OPINION OF THE COURT BY JUSTICE ABRAMSON**

**DISMISSING AS MOOT**

The Medical Vision Group, P.S.C. (MVG), and Schatzie, L.L.C. (Schatzie), petitioned the Kentucky Court of Appeals for a writ prohibiting Judge Timothy Philpot of the Fayette Circuit Court from appointing a receiver to oversee both business entities and from asserting external judicial control over the businesses' accounts and assets. The Court of Appeals denied the writ, finding that because the businesses are alter-ego corporations of Dr. Jitander Dudee, the trial court had jurisdiction over MVG's business