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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: SEPTEMBER 18, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 10-9-08 ElizA Brown D.C.

2007-SC-000850-WC

DENTON W. DYER — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
2007-CA-001164-WC
WORKERS' COMPENSATION BOARD NO. 04-85372

M.W. MANUFACTURERS HOLDING CORPORATION;
HONORABLE ANDREW F. MANNO,
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 soft tissue injury that resolved, that he required no further psychiatric treatment, and that he was not entitled to permanent income benefits. The Workers ' Compensation Board affirmed and the Court of Appeals affirmed the Board. Appealing, the claimant asserts that the evidence compels a decision in his favor under FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007). We find no error in the decision and affirm.

The claimant worked for the defendant-employer as a sales representative. The job required him to sell, stock, and display windows and patio doors at home improvement stores. He fell from a rolling staircase onto a concrete floor while

rearranging inventory at a store on April 28, 2004. He testified that he experienced excruciating pain in his neck, head, and middle back. He was taken by ambulance to the hospital where he was x-rayed, given medication and a work excuse, and directed to follow up with his family doctor, Dr. Brumfield.

The claimant testified that medication and physical therapy failed to relieve his pain and that his left eyelid began to droop. Dr. Dubal prescribed medication, administered cervical epidurals, and also performed stellate ganglion nerve blocks for pain management, which the insurance carrier stopped authorizing eventually. The claimant saw an opthamologist regarding the eyelid and was advised to consider plastic surgery. He also began to see Dr. Smith three times per week for chiropractic treatment of hip pain. He sought treatment for depression and anxiety from Dr. Bradburn, who prescribed Lortab, Valium, Avinza, Nortriptyline, Tricor, Lyrica, and Restoril. At the hearing, the claimant stated that he was unable to work due to constant bilateral arm and shoulder pain, left hip pain, neck pain, and constant headaches.

Pre-injury medical records indicated that the claimant had a history of bilateral knee surgeries and headaches and was taking Ultram for pain as of January 2000. Dr. Brumfield prescribed Ultram and other medications in May 2001, noting that the claimant had back pain due to a displaced rib, which was made worse by hunting with a crossbow. In June 2001, Dr. Brumfield noted complaints of pain in various joints, including the shoulders. He diagnosed arthritis and continued the medications. The arthritic complaints continued in February 2002. Dr. Brumfield also noted complaints of dull pain in the right buttock that radiated into the back of the leg, which had been present for several months and seemed to be worsening gradually. He noted in

January 2004 that the claimant was experiencing muscle spasms that seemed to be related to two of his medications.

X-rays taken on the day of the accident were negative regarding the pelvis, chest, and cervical and thoracic spine. Lumbar spine x-rays showed a mild narrowing of the AP diameter of the L5 vertebra, which appeared to be normal. The vertebral alignment and posterior appendage also were normal, with no acute bone fracture, spinal listhesis, or abnormal curvature of the spine.

A May 2004 cervical spine MRI revealed no evidence of disc protrusion, canal stenosis, or neural foramenal narrowing. A June 2004 brain MRI was unremarkable. A June 2004 nerve conduction study was normal and revealed no evidence of peripheral neuropathy, nerve entrapment, plexopathy, or radiculopathy. A chest x-ray taken in June 2004 revealed no active parenchymal disease. Shoulder MRIs performed in October 2004 revealed a normal left shoulder. Although there was evidence of bursitis in the right shoulder, there was no evidence of a rotator cuff tear or labral injury. .

Dr. Leung performed a neurological consultation in November 2004 to evaluate complaints of bilateral upper extremity pain and numbness. He noted that the claimant fell from a height of about eight feet, landed face down on his chest, and experienced immediate neck and chest pain that went down to both shoulders. Dr. Leung performed upper extremity nerve conduction studies, which were normal.

On March 22, 2005, Dr. Dubal treated the claimant for neck and right upper extremity pain and for headaches. Noting that a stellate ganglion block performed on March 8, 2005, had improved the right arm symptoms and that the symptoms were spreading to the left arm, Dr. Dubal repeated the right stellate ganglion block. Dr. Dubal

performed the block on the left side on May 31, 2005. Dr. Dubal diagnosed chronic regional pain syndrome, bilateral occipital neuralgia, and chronic headache that were secondary to the work injury as well as anxiety and depression.

Dr. Granacher conducted a neuropsychiatric evaluation on the claimant's behalf in October 2005 and reviewed his medical records. He noted that the claimant was discharged from the U.S. Army after he strained his low back and that a medical evaluation at the time revealed a congenital defect in the lower spine. He diagnosed a mood disorder due to complex regional pain syndrome and a cognitive disorder due to post-concussion syndrome and complex regional pain syndrome. Dr. Granacher assigned a 19% permanent impairment rating, indicating that the conditions resulted from the work-related fall. In his opinion, the claimant lacked the mental capacity to perform any work for which for which he was trained or had experience.

Dr. Douglas evaluated the claimant for his attorney in July 2006. He noted that the left eyelid drooped, that the claimant held his right elbow close to the body at a 90-degree angle, that his right mid forearm was mildly swollen, and that his fingernails appeared to be chewed. The claimant complained of very sensitive skin and an inability to extend or grip his right hand. Dr. Douglas diagnosed a bilateral complex regional pain syndrome of the upper extremities, cervical spondylosis, cervical facet and myofascial pain, cervicogenic headaches, reactive depression, anxiety, and right brachial plexopathy. He assigned a 32% permanent impairment rating based on the upper extremities and stated that the claimant lacked the physical capacity to perform his former work.

Dr. Leung re-examined the claimant in September 2006 and reviewed medical

records. He reported that physical examination failed to reveal any significant swelling, changes in the nails, hair growth pattern, shiny skin, osteoporosis, or restriction of passive movement and, thus, concluded that the claimant did not meet the diagnosis of complex regional pain syndrome. He found no physiologic basis for the left eye ptosis, noting the normal brain MRI and neurological examination of the cranial nerves. He concluded that the fall caused a soft tissue injury and post-concussion syndrome, both of which had resolved. He stated that the injury caused no permanent impairment rating or restrictions based on neurological factors.

Dr. Burgess evaluated the claimant for the employer in September 2006. He noted that the claimant complained of constant bilateral arm pain and of severe pain when anything touched his arms but that he was asymptomatic at the time. He noted non-work-related explanations for the forearm swelling and mottled skin and stated that the objective medical findings were insufficient support a complex regional pain syndrome diagnosis.

Dr. Shraberg performed a psychiatric evaluation for the employer in September 2006. He noted that the claimant had been on medication for chronic pain and sleep medication for years before the accident. He also noted that Dr. Brumfield had diagnosed pain in the back, hip, and into the legs before the accident and that the claimant had been taking at least four Ultram per day and Ambien at night. Dr. Shraberg diagnosed pre-injury narcotic dependence, an adjustment disorder of adult life that was associated with the injury and from which the claimant had recovered, and elements of substance abuse dysphoria. He found no evidence of a psychiatric impairment or permanent neuropsychiatric impairment under the AMA Guides to the

Evaluation of Permanent Impairment (Guides) and noted that there was no reason the claimant could not return to his customary work if he discontinued the Valium and Ambien.

The ALJ found Drs. Leung and Burgess to be most credible regarding the physical injury, explaining that Dr. Dubal did not set forth a sufficient basis for the complex regional pain syndrome diagnosis and that Dr. Douglas did not set forth a sufficient basis for the permanent impairment rating that he assigned. Likewise, the ALJ relied on Dr. Shraberg's testimony that all neurodiagnostic studies were negative, that the adjustment order had resolved, and that the claimant had a 0% permanent psychiatric impairment. The ALJ awarded temporary total disability benefits as paid. The ALJ also ordered the employer to pay all medical expenses through September 6, 2006, when Dr. Leung completed his second report, but refused to award future medical benefits.[1]

An injured worker has the burden to prove every element of a claim for benefits.[2] KRS 342.285 designates the ALJ as the finder of fact, which gives the ALJ the sole discretion to determine the quality, character, and substance of evidence and determine whom and what to believe. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986), explains that if the party with the burden of proof does not prevail, that party's burden on appeal is to show that the decision was unreasonable because overwhelming evidence compelled a favorable decision. This is not such a case.

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1 The ALJ rendered the decision in December 2006 and denied the claimant's petition for reconsideration in January 2007, shortly before our decision in FEI Installation v. Williams, supra.

2 Roark v. Alva Coal Corporation, 371 S.W.2d 856 (Ky. 1963); Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App.1984); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979).

FEI Installation v. Williams, supra, stands for the principle that KRS 342.020(1) entitles a worker to medical benefits for so long as a work-related injury continues to produce impairment, which the Guides define as a "loss, loss of use, or derangement of any body part, organ system, or organ function." Contrary to the claimant's assertion, the ALJ did not condition the receipt of medial benefits after September 6, 2006, on the absence of a permanent impairment rating. The ALJ relied specifically on evidence from Drs. Leung, Burgess, and Shraberg, which indicated that the claimant had recovered from the effects of the work-related accident and required no further treatment for its effects. The evidence to the contrary was not so overwhelming as to compel a finding that the injury continued to produce impairment.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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