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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: JANUARY 22, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 2/12/09 Kelly Kloberdanz

2008-SC-000182-WC

FRANCES D. ATKINS — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2007-CA-002151-WC
WORKERS' COMPENSATION BOARD NO. 04-66890

SPECIALIZED ALTERNATIVES FOR FAMILIES AND YOUTH; HONORABLE IRENE STEEN, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) awarded temporary total disability (TTD) and medical benefits that the employer paid voluntarily after the claimant's accident but dismissed her application for permanent income and medical benefits, finding that she sustained no permanent disability. The Workers' Compensation Board and the Court of Appeals affirmed.

Appealing, the claimant asserts that the ALJ erred by relying on a surveillance video and the testimony of her employer's medical experts. We affirm. Not only did she fail to object to the video being submitted as evidence,

she has failed to show that it was unfairly prejudicial, that the ALJ gave it undue weight, or that the evidence compelled a permanent award.

The claimant was born in 1951, completed the eighth grade, and earned a GED. Her work history is varied. She entered college in the 1990s and later earned a master's degree in social work. Although she received social security disability benefits in 2003 due to anxiety and depression, she recovered with the aid of medication and began working for the defendant-employer as a social worker in May 2004. The job required extensive driving in order to place and supervise at-risk teens in foster homes.

The claimant was injured in a head-on motor vehicle collision while working on December 10, 2004. She recalled hitting her head on the steering wheel and her left knee on the dashboard and being taken by ambulance to the emergency room, where she was x-rayed and discharged. The next morning, she complained at the local hospital of pain in the neck, back, hip, and left shoulder as well as blurred vision and difficulty sleeping. She was given pain medication and referred to her primary care physician.

The claimant asserted in her workers' compensation claim that the physical, mental, and emotional effects of the accident precluded a return to work as a social worker. She testified that although she went to her husband's coffee/health food shop daily, she did only light work and spent much of the time resting in a lounge chair or on a massage table. She stated that she could not stand or sit for a period of more than 10 minutes, touch her toes, raise her

arms, lift anything with her left arm, or squat. She complained of severe memory loss and an inability to perform household chores. She also complained of pain in the neck, left shoulder, back, left leg, and hip as well as migraine headaches, depression, and difficulty sleeping, all of which she attributed to the accident. Her husband testified that the accident caused problems with her memory and ability to concentrate.

The employer paid TTD benefits voluntarily from December 12, 2004, through January 24, 2005, and also paid approximately $5,700.00 in medical expenses. Relying on medical experts and the surveillance video, the employer argued that the claimant had no permanent disability and could return to work without restrictions. A summary of the evidence follows.

Four days after the accident, the claimant saw Dr. Goodman, a neurologist. She complained of neck pain, numbness/weakness in the arms, nausea, dizziness, and headaches. Dr. Goodman diagnosed a post-traumatic cervical sprain/strain, headache, and thoracic outlet syndrome or whiplash. Finding no neurological deficits, he referred her to her primary care physician.

Dr. Fluskey, a chiropractor, began to treat the claimant about a week after the accident. He assigned a 28% permanent impairment rating based on cervical, thoracic, and lumbar disc injuries that he attributed to the accident. He also restricted her from lifting more than 10 to 15 pounds occasionally and from riding in an automobile for long periods of time. In his opinion, she could not return to her former work.

Dr. Sheridan, an orthopedic surgeon, examined the claimant on January 6, 2005. Reporting normal clinical findings and several positive Waddell's signs, he diagnosed a cervical and lumbar strain that had resolved, a closed head injury that had resolved, and bilateral knee contusions. He assigned a 0% impairment rating and recommended no further treatment or restrictions.

Dr. Nemastil, a chiropractor, performed a utilization review in February 2005. He determined that the record did not support the claimant's ongoing chiropractic treatment, noting among other things that her complaints varied from day to day and were inconsistent.

Dr. Graulich, a neurologist, conducted a peer review on February 22, 2005. In his opinion, the claimant reached maximum medical improvement (MMI) about six to eight weeks post injury and required no further treatment.

Dr. Bansal, a neurologist, referred the claimant to Dr. Touma for treatment of a torn meniscus and began treating her on March 8, 2005, for numerous physical and mental complaints. He assigned a 35% impairment rating based on a cervical, thoracic, and lumbar sprain and on left shoulder and knee injuries, all of which he attributed to the accident. He also imposed restrictions and thought that the claimant could not return to work.

Dr. Phifer, a clinical neuropsychologist and licensed clinical psychologist, evaluated the claimant in July, September, and October 2005. Noting an inconsistent effort on neuropsychological testing and invalid test scores, he

stated that her actual cognitive functioning exceeded the test results. He assigned a 5% impairment rating to a cognitive/post-concussive disorder.

In August 2006, Dr. Garman diagnosed a post-traumatic left rotator cuff injury and tendonitis, which he "presumed" to be work-related, and a questionable meniscus tear of uncertain cause. He assigned a 10% permanent impairment rating based equally on the upper and lower extremities.

Dr. Gleis, an orthopedic surgeon, evaluated the claimant on November 20, 2006. He thought that she reached MMI within six to eight weeks after the accident and assigned a 5% impairment rating for the cervical spine but a 0% rating for the other claimed conditions. He thought that she could perform at least medium-duty work with a 40-pound lifting restriction.

Dr. Leung, a neurologist, evaluated the claimant on December 6, 2006. He assigned a 0% impairment rating for the cervical and lumbar conditions and thought that she could return to unrestricted work.

Dr. Granacher conducted a neuropsychiatric evaluation on December 12 and 13, 2006. He noted that the claimant presented in a very dramatic manner and that the reported symptoms failed to correlate with the initial medical records, which did not mention a brain injury. Not only did a CT scan performed on the day after the injury reveal no evidence of intracranial injury, a brain MRI performed on December 13, 2006, was normal. He concluded from psychological tests that she was faking her mental state for primary and secondary gain, which strongly suggested malingering. He assigned a 0%

impairment rating to neuropsychiatric conditions and stated that she could return to any work for which she had the training, education, or experience.

Dr. Conte performed a vocational evaluation in January 2007. Noting the claimant's pre-injury social security disability award, he stated that the injury caused no additional occupational disability. In his opinion, she could return to work.

Mr. Tim Schureman, an investigator for the employer's insurance carrier, testified concerning a 150-hour video surveillance that he conducted. Taken from December 2004 to November 2006, the video primarily concerned the claimant's activities in and around her husband's coffee/health food shop. Among other things, it depicted her operating a cash register, bending to pick up objects from the ground, lifting an upright vacuum cleaner into a vehicle, and carrying two large folding tables, one under each arm.

The ALJ determined that the claimant suffered no permanent harm from the injury and was entitled to no additional benefits. Persuaded by the video, which showed the claimant to be "fully capable of carrying on with activities at her health food store, including carrying and setting up tables, bending, stooping, and lifting," as well as by the inconsistencies and invalid test scores reported by her neuropsychologist and by Dr. Granacher, the ALJ concluded that she had grossly overstated her complaints and was fully capable of returning to work for her employer. Persuaded by evidence from the employer's experts, the ALJ determined that the injury's effects required no further

medical treatment of any kind. The ALJ denied the claimant's petition for reconsideration, after which she appealed.

The claimant had the burden to prove every element of her claim.[1] An ALJ must recite sufficient facts to permit a meaningful appellate review, but KRS 342.285 provides that the ALJ's decision is "conclusive and binding as to all questions of fact" and that the Board "shall not substitute its judgment for that of the [ALJ] as to the weight of evidence on questions of fact."[2] Thus, the ALJ has the sole discretion to determine the quality, character, and substance of evidence.[3] An ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof.[4] Although a party may note evidence that would have supported a different decision, such evidence is not an adequate basis for reversal on appeal.[5] When the party with the burden of proof fails to convince the ALJ, that party's burden on appeal is to show that overwhelming favorable evidence compelled a favorable finding, i.e., that no reasonable person could fail to be persuaded by the evidence.[6] A decision

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[1] 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).

[2] Shields v. Pittsburgh & Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982).

[3] Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

[4] Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977).

[5] McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

[6] Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986); Paramount Foods, Inc. v. Burkhardt, supra; Mosley v. Ford Motor Co., 968 S.W. 2d 675 (Ky. App. 1998); REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

supported by substantial evidence is reasonable.[7]

Although the claimant asserts that the surveillance video was unfairly prejudicial, she failed to object to its submission as evidence. In any event, we are not convinced that the ALJ erred by considering it. The claimant cross-examined Mr. Schureman regarding the circumstances under which he made the video and testified herself concerning the activities that it depicted. She complained in her brief to the ALJ that the employer's superior economic resources enabled it to conduct a lengthy surveillance. Although she argued that the unfavorable images were gleaned over an extended period of time and that the video did not show the effects of performing the depicted activities, at no time did she assert that the video was edited in such a manner as to misrepresent the activities that it depicted.

The claimant points to evidence concerning the seriousness of the accident and to medical evidence of permanent impairment, asserting that the ALJ gave undue weight to the video and that she is entitled to permanent income and medical benefits. Having failed to convince the ALJ that her injury continued to be disabling, her burden is to show that the decision was unreasonable under the evidence. She has failed to meet that burden. The ALJ relied not only on the video but also on medical evidence from both parties that indicated the claimant was being disingenuous about her condition and her ability to work. Substantial evidence supported the conclusion that the

[7] Special Fund v. Francis, supra.

work-related injury produced no permanent disability and warranted no further medical treatment.

This case did not involve uncontroverted medical evidence. Dr. Goodman noted the absence of any neurological deficits four days after the accident. Although Dr. Phifer assigned a 5% permanent impairment rating to a brain injury, he noted an inconsistent effort and invalid test results. Dr. Granacher noted evidence that strongly suggested malingering, questioned the existence of a brain injury, and assigned a 0% neuropsychiatric impairment. Although Drs. Bansal, Fluskey, Garman, and Gleis assigned permanent impairment ratings for various physical complaints, testimony from Drs. Sheridan, Graulich, and Leung indicated that no ratable impairment remained at MMI. Moreover, Dr. Sheridan reported several Waddell's signs, which called into question any rating based on subjective factors. Although Dr. Gleis assigned a lifting restriction and although Drs. Bansal and Fluskey thought that the claimant could not return to work, Drs. Leung, Granacher, and Conte stated that she could return to work without restrictions. Testimony from Drs. Sheridan, Nemastil, Graulich, and Granacher supported the conclusion that any work-related injury had resolved and required no further medical treatment.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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