

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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

2008-SC-000219-WC

FINAL

DATE 2/12/09 Kelly Klauer D.C.
APPELLANT

KROGER COMPANY, #379

V.
ON APPEAL FROM COURT OF APPEALS
CASE NO. 2006-CA-002577-WC
WORKERS' COMPENSATION BOARD NO. 05-01216

CHARLES S. ROBINSON;
HONORABLE JOHN W. THACKER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Workers' Compensation Board (Board) vacated an Administrative Law Judge's (ALJ's) decision to exclude impairment due to a pre-existing arthritic condition from the claimant's award. The Board held that the evidence compelled a finding in the claimant's favor and remanded for an award that included the impairment. The Court of Appeals affirmed, and we affirm. The ALJ erred by giving erroneous legal significance to a physician's medical opinions. They compelled a finding that the arthritic condition was dormant and non-disabling until surgery for the injury caused it to become symptomatic and warrant a permanent impairment rating.

The claimant testified that he experienced no knee symptoms before sustaining a work-related left knee injury in August 2004. He explained that he was struck from behind by a four-wheeler cart, lost his balance, and twisted his left knee while moving 50- to 75-pound boxes of frozen chicken from a truck into the cooler. He underwent surgery for a torn meniscus in June 2005 and continued to experience knee pain thereafter. The knee frequently "gave out" as well. He stated that he last worked for the employer in January 2006.

Dr. Loeb evaluated the claimant for the employer in November 2005. He thought it possible but not probable that the injury caused the meniscal tear. He noted that although the claimant sought no treatment for his knees before the 2004 injury, a whole-body bone scan performed in 2002 revealed mild degenerative arthritis in his knees and shoulders. Significant arthritis was present in June 2005, when the surgery was performed. Dr. Loeb stated that the cartilage tear neither caused nor exacerbated the arthritis and that he would have expected full recovery from the knee surgery "had [the claimant] not had the underlying pre-existing osteoarthritis." He assigned a 1% permanent impairment rating for the injury.

When cross-examined, Dr. Loeb testified that recent x-rays revealed the presence of advanced osteoarthritis of the left knee with bone on bone. He explained that the "fairly marked" nature of the meniscal tear required the surgeon to remove the meniscus, which acts as padding in the knee, and that the arthritis became symptomatic due to a lack of padding. He characterized

the claimant's arthritis as being "active but asymptomatic" before the injury, explaining that it was "dormant in the sense that he was asymptomatic" but that it was "an active disease process." He insisted that neither the injury nor the meniscal tear aroused the pre-existing degenerative changes and that the surgery to mend the tear was what caused them to become symptomatic. He stated that the impairment rating would have been from 9% to 11% if he had included the arthritis.

Dr. Goddy evaluated the claimant in December 2005. He determined that no active condition existed before the injury and that the injury caused the meniscal tear, which aroused pre-existing, dormant arthritic changes in the left knee into disability. He assigned a 15% permanent impairment rating to the effects of the injury.

Dr. Loeb reported in January 2006, that the claimant's injury "was an aggravation of a dormant condition and [that] his ongoing symptoms are due to his pre-existing underlying degenerative osteoarthritis." Taking issue with the basis for the impairment rating that Dr. Goddy assigned, he stated, "It would be extremely unusual for an entirely normal knee to have an aggressive rapid deterioration as this gentleman exhibited" in the year between the injury and knee surgery.

The ALJ relied on Dr. Goddy to determine that the claimant sustained a work-related meniscus tear that required surgery but was convinced that the arthritic condition was unrelated to the injury. The latter conclusion was

based on the claimant's testimony that he was five and one-half feet tall and weighed 285 pounds as well as on Dr. Loeb's testimony that an arthritic condition normally would be expected to develop over a period of 15 to 20 years rather than from a cartilage tear. Relying on Dr. Loeb, the ALJ determined that the injury produced only a 1% permanent impairment rating and that the arthritis was neither caused nor exacerbated by the injury. The opinion and order required the employer to pay medical expenses related to the meniscal tear but not to osteoarthritis in the knee. Although the claimant's petition for reconsideration asserted that the ALJ had misinterpreted the evidence regarding the pre-existing condition, the ALJ denied it based on Dr. Loeb's testimony that the injury neither caused nor exacerbated the condition.

The courts have long recognized that a worker is entitled to be compensated for all of the harmful changes that flow from a work-related injury and that are not attributable to an independent, intervening cause.¹ Medical treatment for the effects of the injury is not such a cause. Addressing the legal consequences of pre-existing conditions under the 1996 Act, McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 859 (Ky. 2001), states as follows:

[T]he critical question is one of causation. Although KRS 342.0011(1) clearly indicates that the effects of the natural aging process are not considered to be an 'injury,' it also clearly indicates that work-related

¹ See Beech Creek Coal Co. v. Cox, 314 Ky. 743, 237 S.W.2d 56 (1951); Elizabethtown Sportswear v. Stice, 720 S.W.2d 732 (Ky. App. 1986); See also Arthur Larson and Lex K. Larson, Larson's Workers' Compensation Law, § 10.09 (2008).

trauma 'which is the proximate cause producing a harmful change in the human organism' is an 'injury.' When the two provisions are considered in concert, it appears that their purpose is to emphasize that only those harmful changes which are proximately caused by work-related trauma are compensable pursuant to Chapter 342. Where work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change; hence the harmful change comes within the definition of an injury.

A physician's use of legal terms of art when expressing a medical opinion does not determine the opinion's legal effect. When determining whether a pre-existing condition is compensable, it matters not whether a physician states that the condition was dormant or active before the work-related injury. Nor does it matter that the physician attributes the aggravation, exacerbation, "lighting up," or worsening of the condition to the injury itself or to the effects of medical treatment for the injury.

A pre-existing condition is "active" for the purposes of Chapter 342 and noncompensable to the extent that it is symptomatic and warrants a permanent impairment rating.² A pre-existing condition is "dormant" for the purposes of Chapter 342 if it is asymptomatic and warrants no permanent impairment rating. A pre-existing dormant condition becomes compensable if a work-related injury causes it to become symptomatic and/or warrant a

² McNutt Construction/First General Services v. Scott, *supra*; Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007).

permanent impairment rating. The extent to which the harmful change is compensable depends on what medical treatment it requires, whether the harmful change is temporary or permanent and, if permanent, whether it warrants a permanent impairment rating.

An ALJ may decide which physician to rely upon and may pick and choose among the medical opinions. The ALJ erred in this case by giving erroneous legal significance to Dr. Loeb's medical opinions. Dr. Loeb characterized arthritis as being "an active disease process" before the claimant's injury occurred, but he also noted the absence of evidence that it was symptomatic before the injury. He stated that neither the injury nor the cartilage tear caused or exacerbated the arthritis, but he also stated that the surgery to mend the meniscal tear caused the condition to become symptomatic. No medical evidence indicated that the condition warranted a permanent impairment rating until it became symptomatic.

The legal significance of Dr. Loeb's testimony was that arthritis was a pre-existing dormant condition until surgery for the effects of the injury caused it to become symptomatic and result in a permanent impairment rating. Thus, KRS 342.020 entitled the claimant to reasonable and necessary medical treatment for the effects of the injury, including the effects of the surgery on his arthritic condition. KRS 342.730 entitled him to income benefits based on the entire impairment that flowed from the injury. On remand, the ALJ must

decide whether to rely on the 9% to 11% permanent impairment rating that Dr. Loeb assigned or the 15% rating that Dr. Goddy assigned.

The decision of the Court of Appeals is affirmed

All sitting. All concur.

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