

**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**NOT TO BE PUBLISHED OPINION**

**THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**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-000686-WC

DATE 3/12/09 Kelly Keaber D.C.

DIANA BOWEN

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS  
CASE NO. 2007-CA-000407-WC  
WORKERS' COMPENSATION BOARD NO. 03-94984

HEALTH MANAGEMENT ASSOCIATES;  
HONORABLE GRANT S. ROARK,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

An Administrative Law Judge (ALJ) dismissed the claimant's application for permanent income and medical benefits, finding that she did not suffer a work-related back injury in 2002; that the back injury she sustained in 2003 was only temporary; and that the 2003 injury did not cause a psychological impairment. The Workers' Compensation Board (Board) and the Court of Appeals affirmed. Although the claimant takes issue with all three findings, we affirm because the evidence did not compel favorable findings.

The claimant worked for the defendant-employer as a Licensed Practical Nurse. She had a history of degenerative osteoarthritis and chronic lower back

pain for which she sought emergency room treatment in 2000. She regularly did her charting while standing and co-workers knew of her back problems. Her application for benefits alleged two work-related lower back injuries.

The claimant alleged that she sustained the first injury on May 1, 2002, while lifting a patient. She testified that she informed her supervisor immediately and sought treatment in the emergency room, where she received anti-inflammatory medication that enabled her to finish her shift. MRI revealed a ruptured lumbar disk for which she underwent surgery. She returned to work in July 2002.

The employer asserted that the claimant did not sustain a work-related injury in May 2002 and also that she gave no notice of such an injury until she filed her claim. It relied on testimony from Dr. Graulich, who reviewed her medical records from May 2002, and on testimony from her supervisor and co-workers, who stated that she did not inform them of a work-related injury. Emergency room records indicated that she complained of chronic low back and hip pain in May 2002 but denied a new or recent injury. Other records indicated that she directed her medical bills to be sent to her health insurer and later applied for sickness and accident benefits during her time off work. The claimant explained subsequently that she feared retaliation if she filed a workers' compensation claim.

The ALJ determined that the claimant did not suffer a new work-related back injury in May 2002 and that her condition and need for lumbar surgery at

that time resulted from her chronic pre-existing condition. Appealing, the claimant asserts that she sustained a new injury in May 2002, relying on Dr. Rapier, who evaluated her after the 2003 injury, and on portions of the testimony from Drs. Bean and Wagner, who also saw her after the 2003 injury. She asserts that her own initial testimony constituted substantial evidence that she gave notice of a work-related injury on May 1, 2002.

The claimant had the burden to prove every element of her claim.<sup>1</sup> An ALJ has the sole discretion to determine the quality, character, and substance of evidence.<sup>2</sup> 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.<sup>3</sup> Although a party may note evidence that would have supported a different decision, such evidence is not an adequate basis for reversal on appeal.<sup>4</sup> 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 favorable evidence.<sup>5</sup> A

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<sup>1</sup> 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).

<sup>2</sup> Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

<sup>3</sup> Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977).

<sup>4</sup> McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

<sup>5</sup> 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).

finding supported by substantial evidence is not unreasonable.<sup>6</sup>

Although the ruptured lumbar disk may have constituted an injury in medical parlance, KRS 342.0011(1) defines a compensable injury as being a work-related traumatic event that is the proximate cause producing a harmful change in the human organism. Met with evidence to the contrary, the claimant's evidence did not compel a finding that work-related trauma caused the disk to rupture. Nor did it compel a finding that she gave notice on May 1, 2002, that her symptoms were work-related. Her co-workers' testimony permitted a reasonable inference that no work-related injury occurred because she failed to mention one. Likewise, contemporaneous hospital and emergency room records permitted a reasonable inference that the symptoms for which she sought treatment did not result from an injury but from her pre-existing lumbar condition.

The claimant alleged that a second work-related back injury occurred on February 14, 2003, when she attempted to remove sheets from beneath a patient. Medical evidence indicated that she was taken to the emergency room and hospitalized for several days. Dr. Bean diagnosed a lumbar strain/sprain in March 2003 and found her to be at maximum medical improvement (MMI) in July 2003, at which point the employer discontinued temporary total disability benefits.

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<sup>6</sup> Special Fund v. Francis, supra.

The claimant testified subsequently that she continued to experience disabling back pain and had become depressed. She submitted reports of medical and psychological evaluations and claimed that the injury rendered her substantially, if not totally, disabled. Relying on diagnostic tests and testimony by Dr. Bean and other medical experts, the employer argued that the incident caused only a lumbar sprain that resolved. The ALJ determined ultimately that the claimant did not sustain a new permanent back injury or resulting psychological harm.

Appealing, the claimant asserts that the record contained objective medical findings of a new injury in 2003, but the ALJ failed to consider them. She also asserts that the ALJ erred by failing to consider Dr. Graulich's testimony that took issue with the method by which Dr. Bean rated her permanent impairment. As a consequence, the ALJ failed to rely on the rating that Dr. Rapier attributed to the injury. Her final argument is that the ALJ erred by failing to rely on Drs. Johnson and Granacher regarding the psychological injury. We find no merit in any of these arguments.

Although Dr. Rapier reported that the 2003 injury aggravated the pre-existing lumbar condition and caused permanent impairment, the employer submitted expert medical evidence to the contrary. The claimant received voluntary TTD benefits after the 2003 incident. The ALJ found that she did not

sustain a new permanent back injury due to the incident, i.e., that the injury was only temporary.<sup>7</sup> The conclusion was reasonable under the evidence.

Dr. Bean diagnosed a lumbar strain in March 2003, after two lumbar MRIs and a nerve conduction study failed to reveal a recurrent disc herniation or any other physiological reason for the claimant's complaints. Despite continued complaints of pain, he remained steadfast in his diagnosis after a lumbar myelogram and CT scan also failed to show a reason. He reported on July 29, 2003 that she had a 7% permanent impairment rating under DRE Category II, Lumbar.

Dr. Wagner agreed with Dr. Bean. He explained that any changes evident on the diagnostics performed in March 2003 resulted from the previous surgery and natural aging process rather than the 2003 injury. He explained further that Dr. Bean based the impairment rating on the surgery and non-verifiable complaints of radicular pain rather than the 2003 injury.

Dr. Graulich noted that the claimant's physical examinations were variable and suggested symptom magnification. He concluded elsewhere in the report that "her problem is not work-related." Although he took issue with Dr. Bean's use of the DRE method to assign a permanent impairment rating after the 2003 injury, he also questioned the permanent impairment rating that Dr. Rapier assigned using the range of motion method, noting that "the validity of range of motion is suspect." His testimony did not require the ALJ to disregard

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<sup>7</sup> See Robertson v. United Parcel Service, 64 S.W.3d 284, 287 (Ky. 2001).

Dr. Bean's opinion that the 2003 incident caused only a lumbar strain/sprain or preclude a reasonable inference that Dr. Bean thought the injury resolved with no permanent impairment. The reasonable finding that no new permanent injury occurred in 2003 rendered moot any issue regarding the proper method for assigning a permanent impairment rating under the American Medical Association's Guides to the Evaluation of Permanent Impairment.

The ALJ found Dr. Shraberg's testimony to be most credible regarding the alleged psychological injury and determined that the back injury did not cause a psychological condition. Although the claimant argues that her experts "gave more reasoned opinions," the decision may not be disturbed because his testimony provides substantial evidence to support it. He found evidence of symptom magnification and somatization but no evidence that the back sprain caused the claimant to be depressed. Noting her "worrisome cocktail" of medications, he stated that the continued use of narcotic pain medication was no longer justified and that continued treatment for a mood disorder due to pain simply reinforced her decision to disable herself and become an invalid.

The decision of the Court of Appeals is affirmed.

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



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