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RENDERED: MARCH 19, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 4/9/09 Kelly Klaber D.C.

2008-SC-000190-WC

PEDIATRIC DENTISTRY, P.S.C. APPELLANT

ON APPEAL FROM COURT OF APPEALS
V. CASE NOS. 2007-CA-001573-WC AND 2007-CA-001804-WC
WORKERS' COMPENSATION BOARD NO. 06-00231

ESTUS KENDALL ROY;
HONORABLE GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

AND 2008-SC-000198-WC

ESTUS KENDALL ROY CROSS-APPELLANT

ON APPEAL FROM COURT OF APPEALS
V. CASE NOS. 2007-CA-001573-WC AND 2007-CA-001804-WC
WORKERS' COMPENSATION BOARD NO. 06-00231

PEDIATRIC DENTISTRY, P.S.C.;
HONORABLE GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD CROSS-APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant sustained work-related gradual injuries to his neck and back; that a portion of his combined permanent impairment rating was pre-existing, active, and non-compensable; and that he was only partially disabled although he lacked the physical capacity to return to work as a pediatric dentist. The Workers' Compensation Board reversed regarding the date of injury and exclusion of pre-existing, active impairment but affirmed otherwise. This appeal and cross-appeal concern the Court of Appeals' decision to affirm.

We affirm. Despite the employer's assertions, the facts did not permit impairment that existed in 2002 to be excluded when calculating income benefits. Substantial evidence indicated that the claimant's work caused a degenerative neck and back condition and that no physician informed him the condition was work-related before 2005. He filed a claim within the limitations period. Despite the claimant's assertions, the ALJ determined reasonably that his permanent disability was only partial.

The claimant was born in 1943, became a dentist, and established Pediatric Dentistry, which he later incorporated. He sold the practice to his partner in 2004 but continued to work. His application for benefits alleged that he sustained a work-related gradual injury to his neck and lower back on August 16, 2005. He testified that he experienced symptoms as early as 2001

but that a physician first informed him his neck and back conditions were work-related in May 2005. He notified his partner and office manager at that time and notified the insurance carrier on August 16, 2005, when he realized that he would be unable to continue his practice. He quit working entirely in October 2005.

The claimant testified at the hearing that he could perform light housework, light lawn work, and photography and that he performed home therapy exercises and walked. He stated that he could probably work at a computer but testified subsequently that he had difficulty sitting for extended periods and had never operated a computer. He asserted that his symptoms and pain medication prevented him from working. The parties stipulated that he earned an average weekly wage of $17,396.00 in 2005. The state's average weekly wage for the purpose of awarding income benefits was $607.23.

The ALJ found Dr. Tibbs to be the most persuasive medical expert. Dr. Tibbs began treating the claimant in May 2002, at which time he complained of neck, shoulder, arm, left buttock, and leg pain for about the past three months but mentioned no specific injury. Dr. Tibbs reported that he found "advanced degenerative disc disease in the cervical spine with extensive cervical spondylosis" as well as "an impressive degree of degenerative change in the lumbar spine" at that time. The claimant's neck pain improved with treatment, but the lumbar pain did not. In June 2002 he continued to receive physical therapy thrice weekly and to take anti-inflammatory medication.

The claimant returned to Dr. Tibbs in May 2005, complaining of increased back pain for the past three months. An MRI performed at that time revealed cervical spondylosis, foraminal stenosis, and extensive lumbar disc disease at multiple levels. Dr. Tibbs recommended restricted activity and noted that the claimant "may be forced to contemplate retirement due to the progressive nature of the problem."

Dr. Tibbs testified that the claimant reached maximum medical improvement in May 2006, several months after quitting work. At that time he retained an 8% permanent impairment rating based on the cervical condition and a 12% rating based on the lumbar condition, which combined to a 19% whole-person rating. Dr. Tibbs stated that the claimant would have warranted a 5% rating for the cervical condition and a 10% rating for the lumbar condition in 2002. He thought it medically probable that "many years of prolonged standing in a flexed position in the practice of dentistry was a major contributing factor to the excessive progression of spinal deterioration" and that the work-related injury caused the claimant's complaints.

Responding to the employer's questionnaire in June 2006, Dr. Tibbs indicated that the claimant's cervical and lumbar complaints resulted from both his work and the natural aging process. Responding to the claimant's subsequent questionnaire, he stated that the claimant was permanently and totally disabled by neck and back injuries that resulted from cumulative trauma in his work; that his work was the "primary proximate cause" of the

injuries; and that work-related harmful changes, by themselves, were sufficient to cause the impairment ratings reported previously and to render the claimant unable to work as a pediatric dentist.

The ALJ noted that no medical expert stated explicitly whether the claimant's work aroused pre-existing degenerative changes, producing symptoms, or whether it helped to cause the changes. Relying on Dr. Tibbs, the ALJ determined that repetitive activities throughout the course of the claimant's work were "substantial causative factors" and, thus, that the neck and back conditions were compensable. Noting that they were symptomatic and warranted permanent impairment ratings in 2002, the ALJ determined that it would be "manifestly unfair to the defendant" not to exclude impairment that was present at that time although limitations was not at issue.

The ALJ found the claimant to be partially disabled because his restrictions precluded a return to dentistry but did not preclude other employment.[1] The claimant's award consisted of temporary total disability benefits from October 28, 2005, through May 9, 2006, followed by triple income benefits for a 5% permanent impairment rating until such time as he qualified for normal old-age social security benefits. The ALJ determined on reconsideration that the claimant's injury became manifest on August 16, 2005, when he realized its disabling implications and met with his physician.

The employer maintains that McNutt Construction/First General

[1] KRS 342.0011(11)(c) and KRS 342.0011(34).

Services v. Scott, 40 S.W.3d 854 (Ky. 2001), is inapplicable because the claimant failed to prove that work exacerbated or accelerated the degenerative process in his neck and back. Relying on Brummitt v. Southeastern Kentucky Rehabilitation Industries, 156 S.W.3d 276 (Ky. 2005), the employer asserts that the ALJ properly separated the conditions present in 2002 and 2005. It complains, among other things, that he attempted "to boot-strap the age-related permanent impairment" that was disabling in 2002 onto his 2005 cumulative trauma claim in order to avoid a limitations defense. We disagree.

KRS 342.0011(1) excludes the effects of the natural aging process from the definition of "injury."[2] Thus pre-existing active impairment due to aging must be excluded when determining what portion of an impairment rating is compensable. The court determined in McNutt Construction v. Scott, however, that when work-related trauma arouses a dormant degenerative condition and produces impairment, the harmful change is compensable as an injury. In contrast, when work-related trauma causes a degenerative condition, the entire condition is an injury and any impairment that results is compensable.[3]

The courts have adopted a discovery rule to determine the date of a repetitive trauma, i.e., gradual injury. A work-related gradual injury becomes manifest when a physician informs the worker of the injury and its cause,

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[2] The American Medical Association's Guides to the Evaluation of Permanent Impairment, Fifth edition, page 383, notes that aging changes are present in the spines of 40% of adults after age 35 and in almost all adults after age 50.

[3] See Haycraft v. Corhart Refractories Co., 544 S.W.2d 222, 225 (Ky. 1976).

triggering the notice obligation and limitations period.[4] When a worker continues to perform the same duties after an injury becomes manifest, impairment is compensable to the extent that it results from trauma incurred within two years before a claim is filed.[5]

As the Board pointed out, the evidence compelled a finding that the claimant's injury became manifest in May 2005. Thus, the statute of limitations was not an issue because the claimant quit working in October 2005 and filed his application for benefits in 2006. Dr. Tibbs acknowledged that aging contributed to the claimant's condition but clearly stated that work-related cumulative trauma caused the "excessive progression of spinal deterioration;" that work was the "primary proximate cause" of the neck and back injuries; and that work-related harmful changes alone were sufficient to cause the impairment ratings that he assigned. At no time did Dr. Tibbs attribute the impairment present in 2002 or any portion of the impairment present in May 2006 to the natural aging process. Nor did the ALJ attribute impairment present in 2002 or 2006 to aging.

Brummitt is inapplicable to these facts. It concerned the liability of two insurance carriers for a gradual injury. One was at risk when the injury became manifest and the other was at risk for several months of subsequent work-related trauma. Although the ALJ determined that the initial carrier was

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[4] Hill v. Sextet Mining Corporation, 65 S.W.3d 503 (Ky. 2001); Alcan Foil Products v. Huff, 2 S.W.3d 96 (Ky. 1999).

[5] Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999).

liable for the entire injury, the court reversed and remanded for the ALJ to determine if the subsequent trauma caused an additional harmful change for which the subsequent carrier was responsible.[6]

This case does not involve limitations or the respective liability of two insurance carriers. Although the claimant experienced symptoms in 2002, his work-related gradual injury did not become manifest before May 2005. He filed his application for benefits and quit working within two years thereafter. Thus, the entire impairment that the injury caused was compensable.

The claimant asserts that the evidence compelled a finding of permanent total disability because he was born in 1943, spent his entire career as a dentist, and cannot work as a dentist due to his pain and other symptoms. Pointing to medical evidence that he was totally disabled, he argues that his inability to sit for extended periods and his need to take pain medication impair his ability to perform any type of intellectual job. Thus, he cannot earn an income that approaches his pre-injury earnings. He also argues that he can no longer manage his rental properties due to his injury and that his various passive investments are not evidence of his ability to work.

The extent of a worker's disability under Chapter 342 is a legal rather than a medical question. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48, 51 (Ky. 2000), explains that the 1996 amendments to the Workers' Compensation Act changed the standards for determining whether a worker is

[6] See Special Fund v. Clark.

partially or totally disabled. Although some of the principles set forth in Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968), remain viable, KRS 342.0011(11)(c) now defines permanent total disability as a "complete and permanent inability to perform any type of work." KRS 342.0011(34) defines work as "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy." Hamilton explains that an ALJ must analyze the worker's post-injury physical, emotional, intellectual, and vocational status and the likelihood that the worker would be able to find work consistently under normal employment conditions. A large disparity in pre- and post-injury earning capacity does not necessarily show that the worker is totally disabled, particularly when the pre-injury wage greatly exceeds the state's average weekly wage.

The claimant had the burden of proving every element of his claim, including the extent of his disability.[7] KRS 342.285 provides that an ALJ's decision is "conclusive and binding as to all questions of fact" and prohibits the evidence from being re-weighed on appeal. Having failed to convince the ALJ, the claimant must show on appeal that the decision was unreasonable because overwhelming evidence showed him to be totally disabled.[8] He has failed to meet that burden.

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[7] 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).

[8] 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).

Nothing required the ALJ to give any particular weight to Dr. Tibbs' opinion regarding the question of partial versus total disability. Although many workers born in 1943 would be totally disabled by the type of physical impairments the claimant sustained, the record indicates that he possesses skills that would enable him to perform work other than dentistry. Unlike a worker with little education who has performed nothing but manual labor, he is highly educated, articulate, and has served on various boards and committees. Moreover, he possesses the business acumen necessary to build a highly profitable dentistry practice and to engage in real estate dealings and other business ventures. He may not be able to earn an amount that approaches his earnings as a dentist, but the evidence clearly does not compel a finding that he is completely unable to perform any type of work.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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