

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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-000583-WC

FINAL

DATE 6/11/09 Kelly Klaben D.C.

KARLOS' BISTRO ITALIA

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS
CASE NO. 2008-CA-000234-WC
WORKERS' COMPENSATION BOARD NO. 05-72209

KAREN ROHLING; HONORABLE MARCEL
SMITH, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) awarded enhanced income benefits and future medical benefits for the claimant's work-related back injury. The Workers' Compensation Board affirmed. Reversing in part and remanding, the Court of Appeals determined that the ALJ adopted an impairment rating that did not conform to the AMA Guides to the Evaluation of Permanent Impairment (Guides) but affirmed otherwise. We affirm for the reasons stated herein.

The claimant worked as a prep cook. She testified that she felt a pull in her lower back on September 9, 2005, while lifting and tossing cases of canned tomatoes and produce onto a table. She informed the assistant manager the next day, "when I got up and I couldn't walk." She stated that she experienced

lower back and hip pain, pain through her left leg down to about the knee, and "a few pins and needles" in her toes. On September 12, 2005, she sought treatment with Dr. Quatkemeyer, her family physician, who subsequently recommended an MRI.

Dr. Goldman performed a utilization review concerning the MRI request. He noted that the claimant had received an x-ray, prescriptions for Percocet and Norflex, and physical therapy. He also noted that she complained of pain that radiated into her left leg when she first sought treatment but did not mention it again. A note from the second visit stated that there was no weakness or numbness. Physical therapy notes were similar. Dr. Goldman recommended that an MRI be denied as neither reasonable nor necessary at the present time, stating that it would be reasonable if she continued to have lower extremity symptoms after six to nine additional physical therapy visits.

The claimant remained off work on October 21, 2005, when her automobile was rear-ended by a vehicle moving at about 50 miles per hour while she was stopped for traffic. An MRI performed on October 28, 2005, revealed a small central and left paracentral disc protrusion at L5-S1 that came into contact with the left L5-S1 nerve roots.

Dr. Duplechan began treating the claimant on December 15, 2005. He noted a history of the work-related incident followed by immediate left gluteal pain, pain that radiated into the left lateral thigh, and intermittent episodes of "shocky" pain that shot down the lateral aspect of the leg into the foot. He

noted that the leg pain became more severe and frequent after the automobile accident and that it increased distally, over the posterior lateral aspect of the calf and over the dorsal and lateral aspects of the foot with numbness. He interpreted the MRI as showing evidence of nerve root compression and diagnosed radicular pain that was consistent with the disc protrusion, noting that most symptoms appeared to have been present immediately after the work-related injury and that the automobile accident worsened them. Dr. Duplechan prescribed additional physical therapy and epidural injections, which failed to relieve the pain. He released the claimant to return to work on March 20, 2006.

Dr. Sheridan evaluated the claimant on March 20, 2006. He found no MRI evidence of cord or nerve root compression at any level and diagnosed an acute lumbar sprain that had resolved. In his opinion, she had reached maximum medical improvement (MMI) and required no further medical treatment. He assigned a 0% permanent impairment rating.

The claimant underwent lumbar surgery in August 2006, which relieved the radicular pain. Dr. Quatkemeyer continued to see her about every three months thereafter for complaints of low back and left hip pain. When deposed in January 2007, she continued to take Clinoril, Norflex, and Percocet.

Dr. Bender evaluated the claimant on January 26, 2007, noting a history of the work-related incident, the development of back and left leg pain, the intervening accident in October 2005, and the subsequent surgery. He

attributed the back and leg pain, lumbar disc protrusion with left S1 radiculopathy, and resulting surgery to the work-related injury. Dr. Bender assigned a 13% permanent impairment rating (DRE category III) to the work-related injury based on Table 15-3 of the Fifth Edition of the Guides. He also imposed various restrictions and stated that the claimant did not retain the physical capacity to return to work as a prep cook.

In a narrative report of February 23, 2007, Dr. Bender noted that the claimant reported developing more intense left leg pain and numbness in the left foot after the automobile accident. He also noted that her present complaints included back and left buttock discomfort that intensified with activity. He attributed the protruding disc to the work-related incident but the development of radiculopathy to the automobile accident. He stated that the automobile accident warranted a 5% rating due to radiculopathy based on Tables 15-15, 15-16, and 15-18 of the Guides.¹ He explained that the accident appeared to have advanced the disc condition that the work-related injury caused, resulting in nerve root compression and the radiculopathy that warranted surgery.

Dr. Kriss, a neurosurgeon, evaluated the claimant on March 19, 2007. She gave a history of the work-related incident followed by "shooting" leg pain that radiated intermittently into the lateral left thigh down to the knee and by tingling in the smallest three toes. Although she had no new symptoms after

¹ Tables 15-15, 15-16, and 15-18 are found in Section 15.12, which addresses Nerve Root and/or Spinal Cord impairments.

the automobile accident, her back pain increased. The pain that radiated into her leg became constant, and her left foot became completely numb. Due to evidence of persistent radiculopathy, Dr. Kriss assigned an 11% impairment rating under DRE category III, using Table 15-3 of the Guides. In his opinion, the persistent back pain resulted from the automobile accident, which was also the more probable cause of the herniated disc, nerve root compression, radiculopathy, surgery, the entire impairment rating, and the need for any further medical treatment. He stated that the claimant should have reached MMI within six months after the work-related injury.

In a supplemental report of May 17, 2007, Dr. Kriss took issue with the impairment rating that Dr. Bender assigned, stating that it contained a "huge typo." He explained that Dr. Bender attributed the disc protrusion to the work-related incident and the development of radiculopathy to the automobile accident but appeared to have contradicted that theory of causation when rating impairment. Referring to Table 15-3 of the Guides, Dr. Kriss noted that Dr. Bender assigned a 13% impairment rating (DRE category III) to the work-related injury although a category III rating must be supported by a radiculopathy diagnosis, and he assigned what Dr. Kriss described as a "non-radicular" 5% rating under DRE category II to the automobile accident.

The claimant testified at the hearing that the injury occurred on a Friday. Pain shot down her entire left leg when she got out of bed on Saturday and she could barely stand. She saw Dr. Quatkemeyer on Monday. She stated that her

symptoms worsened after the automobile accident and that she could no longer perform the heavy lifting and bending that work as a prep cook required. At the close of the hearing, the ALJ ordered simultaneous briefing and stated that the case would stand submitted on July 20, 2007.

On July 17, 2007, the claimant filed a motion to submit an additional medical report from Dr. Bender out of time. The report clarified that the work-related incident caused an 8% impairment (DRE category II) and that the automobile accident caused an additional 5% impairment, for a total impairment of 13% (DRE category III). The employer objected and moved to strike the report. The motion lay dormant when the claim was submitted.

The employer argued in its brief that the claimant failed to meet her burden of proof. Relying on Dr. Kriss, it maintained that the superseding automobile accident caused all permanent harm and that the September 2005 injury caused no permanent harmful change and required no further medical treatment.² The employer also argued that Dr. Kriss offered the only credible medical evidence regarding the extent and duration of disability because Dr. Bender assigned an impairment rating that did not conform to the Guides³ and failed to specify whether the claimant's inability to work as a prep cook resulted from the work-related injury or the automobile accident.

² See Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001).

³ See Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 152 (Ky. App. 2006).

Based on the medical evidence submitted during proof time, the ALJ found that the work-related injury caused a 13% impairment rating as supported by objective medical findings during treatment and examination. The ALJ found that the claimant did not retain the physical capacity to work as a prep cook and enhanced her income benefit under KRS 342.730(1)(c)1. Finally, the ALJ awarded future medical benefits for the effects of the work-related injury but refused to award benefits related to the surgery, finding that it would not have been required without the automobile accident.

The employer's petition for reconsideration asserted that the claimant failed to meet her burden of proof. It argued, among other things that even Dr. Bender conceded in the untimely medical report that his previous opinions regarding the impairment rating from the injury did not conform to the Guides. The ALJ denied the petition.

Affirming, the Board noted that nothing permits evidence submitted out of time to be considered. It determined that substantial, timely-submitted evidence supported the finding that the work-related injury produced radiculopathy and a 13% rating under the Guides. The employer appealed.

Reversing in part and remanding, the Court of Appeals determined that the ALJ erred by adopting an impairment rating that did not conform to the Guides and must base the award on the 8% rating that Dr. Bender assigned ultimately. The decision relied on Dr. Kriss' report, the Guides' criteria for DRE category III, and the untimely medical report. The employer appeals.

The employer argues that the Court of Appeals erred by failing to order the claim to be dismissed on remand because Dr. Bender's final report was submitted out of time and never admitted into evidence. Thus, the 8% rating that it contains may not be considered on remand. Although the claimant argues that substantial evidence supported the ALJ's reliance on the 13% rating, she does not appeal the Court of Appeals' decision to the contrary.

The untimely report was never admitted into evidence. Nonetheless, the employer has relied on the report since its petition for reconsideration to support an argument that the 13% rating Dr. Bender assigned to the work-related injury does not conform to the Guides. Convinced by the argument, the Court of Appeals relied on the report as part of its rationale for reversing and as the basis for its order of remand.

Whether an impairment rating conforms to the Guides is a medical question to be decided based on expert medical testimony.⁴ Dr. Kriss took issue with Dr. Bender's methodology for assigning a 13% impairment rating to the work-related injury and an additional 5% rating to the subsequent accident, basing his explanation on Table 15-3 of the Guides. Although his testimony pointed to weaknesses in the rating attributed to the injury, it was not so overwhelming as to compel the ALJ to reject the rating as being improper under the Guides.⁵

⁴ Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003).

⁵ See Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Dr. Kriss stated that a 13% rating under Table 15-3 requires evidence of radiculopathy, but the record contained substantial evidence that the claimant experienced radiculopathy during the period between injury and the automobile accident. Dr. Quatkemeyer recorded complaints of low back pain that radiated down the left leg on September 12, 2005.⁶ He diagnosed left lower extremity radiculopathy and requested an MRI as the utilization review report documents. Physical therapy notes from September 29, 2005, refer to pain that shot down the leg when the claimant stooped or bended as well as to frequent "pins and needles" in the left foot. Notes from October 4, 2005, refer to numbness in the bottom of the foot. Dr. Bender's initial report did not refer to radiculopathy specifically, but it indicated clearly that the automobile accident occurred after the back injury and attributed a 13% impairment rating to the injury. His second report indicated that he based an additional 5% impairment for radiculopathy due to the accident on different tables from the Guides. Although it called the accuracy of the 13% rating into question, it did not compel the ALJ to disregard the rating.⁷

The Court of Appeals relied on the untimely report as well as Dr. Kriss's opinion to conclude that the 13% impairment rating failed to conform to the

⁶ Although Dr. Quatkemeyer's records are not in evidence, Dr. Kriss cited them and physical therapy notes from the period between the injury and automobile accident in his report.

⁷ Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977) (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 party's total proof).

Guides. By doing so, the court implied that it viewed the employer's reliance on the report when attempting to discredit the 13% rating as being a waiver of its initial objection to admitting the report. The decision also implied that, having found Dr. Bender to be most persuasive regarding the impairment that the injury caused, the ALJ must admit the report on remand, consider it, and rely on Dr. Bender's clarification that the work-related injury actually produced an 8% impairment rating under the Guides. The employer points to no error in the decision.

The ALJ's opinion contained sufficient factual findings to discern the basis for a conclusion that the work-related injury deprived the claimant of the physical capacity to return to her work as a prep cook.⁸ Moreover, the record contains substantial evidence to support the finding. Nothing refuted the claimant's testimony that the work required her to stand and do a great deal of bending, lifting, and carrying items such as 40-pound cases of canned tomato products and 60-pound pots of cooked pasta and water. Medical reports noted the presence of at least some left radicular pain and numbness during the period between the work-related injury and subsequent accident and also indicated that the injury produced a permanent impairment rating. Although other medical evidence indicated that the accident caused more frequent and intense symptoms and increased the claimant's permanent impairment rating,

⁸ See Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973); Shields v. Pittsburgh & Midway Coal Company, 634 S.W.2d 440 (Ky. App. 1982).

it did not compel a finding that she would have been able to work as a prep cook had the accident not occurred.

The employer argues finally that the ALJ erred by awarding future medical benefits after concluding that the surgery was not compensable. We disagree because KRS 342.020(1) entitles a worker to reasonable and necessary medical treatment at the time of the injury and thereafter during disability. A finding that a work-related injury produces a permanent impairment rating compels a finding that the worker is entitled to an award of future medical benefits.⁹ In the event that a post-award medical expense is unreasonable, unnecessary, or unrelated to the compensable injury, Mitee Enterprises v. Yates, 865 S.W.2d 654 (Ky. 1993), and National Pizza Company v. Curry, 802 S.W.2d 949 (Ky. App. 1991), permit the employer to reopen and contest it.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

⁹ See FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007).

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