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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MARCH 24, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000287-WC

HARRISON MEMORIAL HOSPITAL — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2009-CA-001458-WC
WORKERS' COMPENSATION BOARD NO. 05-63661

GARY SIPE;
HONORABLE JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Relying on testimony by the claimant's treating neurosurgeon, an Administrative Law Judge (ALJ) found that the work-related June 2006 injury required surgery to repair a herniated lumbar disc and produced a 10% permanent impairment rating, none of which represented pre-existing active impairment. The Workers' Compensation Board reversed, however, convinced that the testimony required a 5% impairment rating to be excluded. This appeal is taken from a Court of Appeals decision to reverse the Board and reinstate the ALJ's finding. The court determined that the Board erred by substituting its judgment for the ALJ's. We agree and affirm.

KRS 342.285 permitted the ALJ to choose among the reasonable but conflicting inferences that could be drawn from Dr. Norelle's testimony and the other evidence. The Board should not have disturbed the decision because the ALJ's interpretation of the testimony was reasonable and supported the legal conclusion that no pre-existing active impairment need be excluded when calculating the claimant's income benefit.

The claimant was born in 1948. He has an eleventh-grade education and an employment history consisting primarily of manual labor. He began working for the Harrison Memorial Hospital in 1998 as a utility worker in the maintenance department. The claimant performed a variety of duties that included sweeping and cleaning the main entrance; picking up and delivering lab reports and supplies; and lifting and emptying containers of trash and medical waste that weighed up to 100 pounds and frequently weighed 50 to 75 pounds. He sustained multiple injuries during the course of his work.

The claimant sustained a low back strain on July 26, 2000 while lifting trash. Contemporaneous medical records indicate that the hospital physician, Dr. McKemie, prescribed pain medication, muscle relaxers, and physical therapy for complaints of low back and bilateral hip pain. X-rays taken in September and October 2000 showed mild degenerative changes in the lumbar spine and hips. A report prepared subsequently by Dr. Templin indicates that an MRI performed in September 2000 showed a "suggestion of a left lateral disc protrusion at L4-5 but was unremarkable otherwise." The claimant returned to

his usual work in mid-November 2000 upon his release from physical therapy. He stated that Dr. McKemie became his primary care physician after the injury.

Dr. McKemie treated the claimant again for complaints of low back pain on July 19, 2004 and September 19, 2004. The claimant testified subsequently that he began to experience back pain while lifting trash at work on July 19, 2004. He stated that he thought he missed work for two or three weeks after the incident and continued to have back pain thereafter, but it was not constant.

The present claim, which was filed in September 2007, alleged an injury from the effects of cumulative trauma sustained while lifting trash or medical waste during a period that included November 10, 2005; November 28, 2005; December 14, 2005; and June 12, 2006. Dr. McKemie treated the claimant initially but referred him to Dr. Norelle for complaints of low back and left leg pain in July 2006. Dr. Norelle, a neurosurgeon, performed a lumbar diskectomy at L4-5 with good results and the claimant returned to work in November 2006. An incident in October 2007 caused him to miss about two weeks' work but is not at issue. He continued to work when his claim was heard, earning the same or a greater wage than at the time of his injury. He testified, however, that he feared the hospital would eventually refuse to accommodate the 40-pound lifting restriction that Dr. Norelle imposed.

The hospital asserted, among other things, that a portion of the claimant's present impairment rating represented a pre-existing active condition and must be excluded for the purpose of calculating his income

benefit. Relying on testimony from Dr. Stephens and selected testimony from Dr. Norelle, the hospital argued that a 5% impairment rating resulted from the 2000 injury and must be deducted from his present impairment rating.

When deposed in 2007 the claimant testified that he experienced pain "all across my lower back and left leg" after the 2000 injury and described the pain as going down the back of his left leg. He corrected the statement subsequently and stated that the left leg pain did not occur until before the 2006 surgery. When asked whether he experienced left leg pain in 2004, he stated that he did not think so and also stated: "I get the surgery mixed up with 2000. I had the surgery last year, and that's when I had the sciatic nerve pain in the left leg. The—in 2000, the constant pain—the pain was lower back and hips [sic]. It radiated into my hips."

The claimant stated with respect to the presently-alleged injuries that he sought medical treatment after experiencing intense low back pain while lifting at work on November 10, 2005. Hospital records indicate that the only significant x-ray findings were mild diffuse lumbar degenerative changes, particularly at L4-5. A lumbar MRI performed on November 22, 2005 showed a disc bulge at L5-S1 with a small area of protrusion but no evidence of nerve root impingement; a disc bulge at L4-5 with a small protrusion far lateral to the left; and mild degenerative facet changes. Dr. McKemie diagnosed lumbar pain on December 6, 2005 for which he prescribed a non-steroidal anti-inflammatory medication as well as various forms of physical therapy and an exercise program.

Dr. McKemie noted on December 14, 2005 that the claimant reported experiencing pain shoot across his right hip while lifting at work that morning. He also noted the absence of any weakness or paresthesias in the legs or tenderness in the lumbar spine. He diagnosed a lumbar strain with muscle spasms and took the claimant off work.[1] Dr. McKemie noted on January 5, 2006 that the low back pain had improved and that the claimant no longer experienced left leg symptoms and released him to return to light-duty work. Hospital records indicate that the claimant sought emergency room treatment for the third time on June 17, 2006 for back pain that he attributed to a pinched sciatic nerve. A CT scan performed at the time revealed some spurring and nerve root impingement at L4-5 on the left; a mild disc bulge at L5-S1, slightly more evident on the left; and mild degenerative facet changes in the lower lumbar spine. A lumbar MRI revealed minimal far left lateral disc protrusion which appeared to impinge upon the left L4 nerve root sleeve as it exited the foramen and mild degenerative facet changes in the lower lumbar spine.

Dr. Norelle first saw the claimant in July 2006 at Dr. McKemie's request to evaluate him for complaints of low back and left leg pain that radiated down the posterior aspect of the left leg to the dorsum of the left foot and worsened with sitting or standing. His complaints also included some right lower extremity numbness. Dr. Norelle's notes indicate that she diagnosed a lateral

[1] The parties stipulated subsequently that the employer paid temporary total disability (TTD) benefits voluntarily from December 14, 2005 through January 3, 2006.

disc herniation at L4-5 and lumbar degenerative disc disease and explained that surgery would help his leg symptoms but would not help his chronic back pain. She performed an L4-5 diskectomy in September 2006. Dr. Norelle's Form 107 report indicates that she attributed the claimant's symptoms to his injury; assigned a 10% impairment rating, none of which was active before the injury; and restricted him from lifting more than 40 pounds and from repetitive twisting and bending.

When deposed by the employer in January 2007, Dr. Norelle testified that the claimant reported the 2000 injury and reported having "on and off" back pain from 2000 to 2006 for which he took Flexeril and Lortab periodically. She noted, however, that he had started to have left leg pain when she saw him in July 2006. The employer asked her to assume that he had persistent complaints of non-radicular low back pain that required medication following a 2000 lumbar injury and questioned whether such complaints warranted a 5% to 8% impairment rating under DRE lumbar category II. She responded that they would warrant a 5% rating.

Answering a question by the claimant's attorney, Dr. Norelle stated that she based the 10% rating listed in her Form 107 report solely on the herniated disc that occurred in 2006 "and did not take into account any of his pre-existing [impairment]." She acknowledged that any opinion she had about the claimant's condition in 2000 would be speculative and that his ability to perform his usual work from 2000 to 2005 would indicate that his symptoms did not rise to the level that warranted an impairment rating under DRE

category II. She stated that her report continued to reflect her opinion concerning the impairment rating produced by the herniated disc that occurred in 2006. Yet, when asked subsequently by the employer how much of the rating was related to the 2000 injury, she stated "[p]robably the five percent." She explained that she had recently been "made aware of" MRI scans from 2000 and 2005, which she had not reviewed personally. They showed an L4-5 disc protrusion "in concordance with the 2000 injury."[2]

Dr. Norelle agreed with a statement by the claimant's attorney that characterized his back condition as a "pre-existing non-active condition" insofar as it did not interfere with his ability to work until July 2006. She also agreed with a statement by the employer's attorney that the protruding L4-5 disk would have warranted an impairment rating under DRE category II regardless of whether the claimant continued to work.

Dr. Templin evaluated the claimant in July 2007 at the request of his attorney. He performed a physical examination; reviewed and summarized the claimant's medical records; and personally reviewed and summarized the results of the 2000 x-rays and MRI, the 2005 MRI, the 2006 CT scan, and the 2007 MRI. He assigned a 13% impairment rating under DRE category III based on the herniated disc with surgery and a residual radiculopathy; attributed the rating entirely to the 2005-2006 injuries; and stated that the claimant did not

[2] A September 29, 2000 MRI showed a "suggestion" of a left lateral disc protrusion at L4-5 but was unremarkable otherwise. An MRI performed on November 22, 2005, after the first incident alleged in the present claim, showed a disc bulge at L4-5 with a small protrusion far lateral to the left.

have an active impairment before the injuries. He also imposed various work restrictions and stated that the claimant did not retain the physical capacity to return to the type of work performed at the time of injury.

Dr. Stephens performed an independent medical evaluation for the employer in December 2007. X-rays taken on that date showed multi-level degenerative disc disease with no instability. Dr. Stephens attributed the claimant's present symptoms to the July 2000 injury as well as the 2005 and 2006 injuries. He opined that the 2000 injury produced a 5% to 8% impairment rating under DRE category II and warranted a restriction against repetitive lifting of more than 40 pounds. Dr. Stephens also opined that the claimant's symptoms changed in 2005; that the diskectomy was reasonable and necessary treatment for the alleged injuries; that his present impairment rating would be 10% to 13%; and that his present lifting restriction would remain at 40 pounds.

The ALJ found Dr. Norelle to be the most credible witness concerning the claimant's prior active disability and current impairment despite the fact that she "seemed somewhat confused by the questions" when deposed. Noting her unequivocal statement that she based the 10% impairment rating on the herniated disc that occurred in 2006, the ALJ concluded that the June 2006 injury produced a 10% impairment rating and calculated the income benefit accordingly. Relying on Dr. Norelle as well as the claimant's own testimony, the ALJ determined that the injury deprived him of the physical capacity to

return to the type of work performed on the date of injury and that he was entitled to a triple rather than a double benefit.[3]

The employer argues that the ALJ erred and that the Board's decision should be reinstated because the evidence, *Roberts Brothers Coal Co. v. Robinson,*[4] and *Finley v. DBM Technologies*[5] compelled a pre-existing 5% impairment rating to be deducted from the 10% rating used to calculate the claimant's income benefit. We disagree.

I. STANDARD OF REVIEW.

KRS 342.285 designates the ALJ as the finder of fact in workers' compensation claims. It prohibits the Board from substituting its judgment with respect to the weight of evidence and gives the ALJ the sole discretion to determine the quality, character, and substance of the evidence regarding questions of fact.[6] It permits an ALJ to interpret and draw reasonable inferences from the evidence; to choose which evidence to rely upon; to reject any testimony; and to believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's proof.[7] As a consequence, other evidence that would have supported a different conclusion is an inadequate basis for reversal on appeal.[8] Having

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[3] *Fawbush v. Gwinn,* 103 S.W.3d 5 (Ky. 2003).

[4] 113 S.W.3d 181 (Ky. 2003).

[5] 217 S.W.3d 261 (Ky. App. 2007).

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

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

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

failed to convince the ALJ that a portion of the 10% impairment rating that existed after the June 2006 injury represented pre-existing active impairment, the hospital must show on appeal that the finding was so unreasonable under the evidence that it must be viewed as being erroneous as a matter of law.[9]

II. PRE-EXISTING ACTIVE DISABILITY AFTER 1996.

In 1996 the General Assembly amended the Workers' Compensation Act extensively. The post-1996 version of KRS 342.730(1)(b) bases the amount of permanent partial disability due to an injury on the permanent impairment rating that the injury produces. KRS 342.730(1)(e) prohibits impairment for non-work-related disabilities or for conditions previously compensated under Chapter 342 from being considered when determining the extent of permanent partial disability or duration of benefits. KRS 342.730(2) prohibits income benefits from duplicating those "payable" for a pre-existing disability and requires the period of income benefits payable for an injury to be reduced by the period of income benefits "paid or payable" for a prior injury causing disability to the same member or function or different parts of the same member or function.

Although the 1996 amendments eliminated Special Fund liability, the court determined in *McNutt Construction/First General Services v. Scott*[10] that the work-related arousal of a pre-existing dormant degenerative condition into disabling reality remains compensable because KRS 342.0011(1) considers

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[9] *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

[10] 40 S.W.3d 854 (Ky. 2001).

work-related trauma that produces a harmful change in the human organism to be an injury. Except where KRS 342.730(1)(e) or (2) would require an exclusion, the amendments also appear to have left unchanged the longstanding principle that disability from a pre-existing condition need not be excluded when awarding benefits for an injury that would have produced the worker's entire present disability independently.[11]

Finley v. DBM Technologies[12] explains that a pre-existing condition must be both symptomatic and impairment-ratable immediately before a work-related injury occurs in order to be viewed as being a pre-existing active condition that is not compensable in a claim for the injury. *Finley* also points out that a condition may be aroused into disability on either a temporary or a permanent basis and that only permanent disability must be excluded from a permanent disability award.[13] The exclusion from a partial disability award equals the impairment rating that the pre-existing active condition produces.[14] The significance of an individual's ability to continue to work despite an impairment-ratable condition is that it provides evidence of the extent to which the condition was symptomatic immediately before the individual sustained the work-related injury for which benefits are claimed.

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[11] *Young v. Fulkerson*, 463 S.W.2d 118, 120 (Ky. 1971); *Young v. Campbell*, 459 S.W.2d 781 (Ky. 1970).

[12] 217 S.W. 3d at 265.

[13] *Id.*

[14] *Robinson*, 113 S.W.3d at 183.

Having asserted that a portion of the claimant's 10% impairment rating was not compensable because it was active when the injuries at issue occurred, the employer had the burden to prove the assertion.[15] The ALJ found Dr. Norelle to be most credible with respect to pre-existing active disability and impairment. A number of reasonable but conflicting inferences could be drawn from Dr. Norelle's testimony. KRS 342.285 vested the ALJ with the sole authority to choose among those inferences.

The record contains no evidence of a stipulation or finding indicating that the claimant's 2000 injury would have warranted permanent income benefits; that a portion of his 10% impairment rating was non-work-related or related to a previously-compensated condition; or that any income benefits were paid or payable for the 2000 injury.[16] Acknowledging that the claimant had previous back problems that were symptomatic from time to time and required medication, the ALJ interpreted Dr. Norelle's testimony to mean that she assigned a 10% impairment rating based solely on the herniated disc that occurred in 2006. In other words, the ALJ concluded from the testimony that the herniated disc and resulting surgery would have produced a 10% impairment rating had there been no pre-existing condition.[17] The ALJ's

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[15] *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. 1984).

[16] Records from the Department of Workers' Claims indicate that First Report of Injury #00-74161 was filed after the 2000 injury but that no claim was filed.

[17] Dr. Templin's testimony also supported the conclusion that the herniated disc, alone, would warrant the entire 10% rating. He assigned a 13% impairment rating under DRE category III after reviewing the claimant's medical records and examining him. Dr. Templin stated that he based the rating entirely on the effects of the herniated disc and surgery.

decision should not have been disturbed because the interpretation was reasonable and supported the legal conclusion that no pre-existing active impairment need be excluded when calculating the claimant's income benefit.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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