

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED."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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE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UNPUBLISHED KENTUCKY APPELLATE DECISIONS,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BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED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

2011-SC-000509-WC

KNOTT COUNTY BOARD OF
EDUCATION

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS
CASE NO. 2010-CA-001200-WC
WORKERS' COMPENSATION NO. 07-71407

LOIS HAMILTON;
HONORABLE CAROLINE PITT CLARK,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

REVERSING

An Administrative Law Judge (ALJ) found that the claimant sustained work-related physical injuries; awarded her the nearly 16 months of temporary total disability (TTD) benefits paid voluntarily by her employer; and also awarded triple partial disability benefits based on the 15% permanent impairment rating assigned to a psychiatric condition that resulted from her physical injuries. Having rejected the opinions of the claimant's medical expert concerning her alleged neck and shoulder injuries as being unreliable because they were based on an incomplete medical history, the ALJ refused to award additional benefits for the conditions.

The Workers' Compensation Board reversed to the extent that the ALJ failed to award benefits for the neck condition; vacated the decision with respect to the alleged shoulder and gastrointestinal conditions; and remanded that portion of the claim for further consideration under *Finley v. DBM Technologies*.¹ The Court of Appeals affirmed except with respect to the failure to award benefits for the alleged neck injury.

Appealing, the employer argues that the Board and Court of Appeals misconstrued *Finley* and erred by remanding the claim. The claimant did not appeal concerning the neck injury. We reverse for the reasons stated herein.

The claimant, a special education teacher, sustained physical injuries on October 29, 2007 in an altercation with an 11-year-old autistic student who had been disrupting a class. The student shoved, pushed, and grabbed her on numerous occasions and at one point she restrained him from behind in a bear hug. The claimant sought medical treatment later that day for neck and right shoulder pain; did not return to work thereafter; and underwent shoulder surgery in March 2008. She sought permanent total disability benefits under Chapter 342 based on allegations of an injury to her neck, right shoulder, and right arm and of anxiety and a resulting gastrointestinal disturbance.

The claimant's Form 105 medical history failed to mention any previous treatment for shoulder or neck pain or for psychological or gastrointestinal problems. She also failed to mention the previous treatment to Drs. Templin and Granacher, who evaluated her and prepared reports in support of her

¹ 217 S.W.3d 261 (Ky. App. 2007).

claim. Subsequent evidence showed that she had a longstanding history of treatment for right shoulder complaints and of prescriptions for psychotropic medication before the workplace incident.

Medical records showed that the claimant sought treatment with Dr. Stumbo in September 2001 for bilateral shoulder pain that had been present for one year but had worsened during the previous two to three weeks. He diagnosed bilateral shoulder synovitis; prescribed Celebrex; and gave her an injection.

The claimant saw Dr. Spady in 2005, complaining of right shoulder pain for the past three years. She described the pain as being moderate, as affecting her daily activities, and as being exacerbated with movement. Dr. Spady's notes indicated that she had a limited range of motion and had received an injection with no positive results.

Dr. Belhausen also treated the claimant in 2005 for complaints of right shoulder pain. He noted that she had experienced similar symptoms three years earlier and that an injection had resolved her symptoms at that time. He also reviewed an MRI performed in 2002, which revealed "abnormal signal intensity at the insertion of the supraspinatus tendon, suggestive of a partial tear versus tendonitis." He injected the shoulder and thought that injections should be adequate unless she began to experience other symptoms.

The claimant sought medical treatment on October 29, 2007 for neck and right shoulder pain that she attributed to the workplace incident that occurred earlier that day. She was taken off work for two days. Dr. Menke

diagnosed a right shoulder impingement syndrome and referred the claimant to Dr. Kirk after a December 2007 shoulder MRI revealed what appeared to be at least a partial-thickness rotator cuff tear.

Dr. Kirk performed surgery on March 20, 2008 to repair a partial-thickness rotator cuff tear involving the anterior aspect of the supraspinatus tendon and also repaired fraying of the glenoid labrum. He released the claimant to return to light duty, with a ten-pound lifting restriction and a restriction against over-the-shoulder work on June 11, 2008.

Dr. Templin, an occupational medicine specialist, evaluated the claimant in July 2008 at her attorney's request. She reported a history that included the October 29, 2007 incident but no previous physical or psychological complaints. Dr. Templin determined that the incident caused a right rotator cuff tear, an exacerbation of pre-existing degenerative cervical disk disease, the development of post-traumatic stress disorder, and a psychophysiologic gastrointestinal disturbance. He assigned a 6% impairment rating based on the upper extremity, a 9% impairment rating based a digestive system disorder involving the colon, and a 5% impairment rating based on the cervical spine, which combined to yield an 18% impairment rating. He noted, however, that the 9% impairment rating based on the digestive system disorder should be eliminated if Dr. Granacher were to include a psychophysiologic gastrointestinal disturbance when rating the claimant's psychiatric impairment.

Dr. Granacher evaluated the claimant in July 2008. He opined that the workplace incident caused an anxiety disorder and panic attacks and that the anxiety disorder resulted in a psychophysiological gastrointestinal disorder. After receiving and reviewing medical records concerning the previous treatment for anxiety and depression, he remained steadfast in his opinion that the work-related incident was sufficient to induce the claimant's present anxiety regardless of any previous anxiety that Dr. Varia associated with a premenstrual syndrome. Dr. Granacher's report indicated that he based the 15% permanent impairment rating that he assigned on chapters of the *AMA Guides to the Evaluation of Permanent Impairment (Guides)* that address psychological disorders and a chapter that addresses nervous system disorders, which includes anorectal system neurologic impairments.

Dr. Jenkinson's March 16, 2009 report responded to questions the employer posed concerning the alleged right shoulder injury. He prepared the report after reviewing records from Dr. Belhasen, which he noted were not available to him when preparing an earlier report that is not of record. Dr. Jenkinson stated that the 2002 MRI to which Dr. Belhasen referred was "remarkably similar" to a 2007 report.

Addressing a statement made in his previous report, which indicated that the rotator cuff abnormality shown on the claimant's 2007 MRI "is extremely common in the non-symptomatic population," Dr. Jenkinson now considered it "quite clear" that the claimant had right shoulder symptoms long before the workplace incident. He opined that her shoulder condition could not

be assessed accurately because she exaggerated her symptoms; that the condition did not result from a single event but from years of wear and tear; and that it was impossible to determine whether her pre-existing condition was active when she was injured due to the questionable accuracy of the symptoms she reported. Moreover, he considered it impossible under the circumstances for any physician to assign causality with any degree of medical probability. Emphasizing that most of the present complaints were “subjective and nonverifiable” and that the claimant had “no significant objective abnormality,” he concluded that she required no restrictions. He did not address the alleged cervical injury.

Dr. Best evaluated the claimant for the employer on May 5, 2009. His report noted her history of right shoulder and neck pain prior to October 2007. He noted also that she complained of shoulder and neck pain when seeking treatment after the workplace incident; that a subsequent cervical MRI showed degenerative changes but no focal disk herniation; that Dr. Kirk performed surgery in March 2008 to repair a partial-thickness rotator cuff tear and frayed glenoid labrum; and that Dr. Kirk released her to return to work with restrictions in June 2008.

The claimant reported to Dr. Best that Dr. Kirk had recommended additional shoulder surgery when she last saw him in December 2008 but that the employer’s insurance carrier refused to approve the procedure. She complained that her shoulder was weak and atrophied and rated her pain at 6 on a 10-point scale. Dr. Best’s physical examination revealed that she had a

normal range of motion in the cervical spine; that she exhibited some loss of right shoulder range of motion; but that she exhibited no shoulder atrophy or asymmetry. He diagnosed a pre-existing partial right rotator cuff tear and chronic glenoid fraying and opined that the claimant reached MMI from an orthopedic standpoint three months after the surgery, *i.e.*, in July 2008.

Dr. Best assigned a 2% impairment rating based on loss of range of shoulder motion but attributed none of the impairment to the workplace incident. He explained that “fraying of the glenoid is truly part of the ‘natural aging process’ in an individual with a partial-thickness rotator cuff tear dating to 2005.” He opined that all of the claimant’s right shoulder symptoms and treatment, including the surgery, were due “exclusively” to the effects of the pre-existing pathology in her right shoulder. He did not consider any medical treatment to be reasonable, necessary, or causally related to the effects of the workplace incident. Finally, he stated that a comparison of the pre- and post-injury MRIs revealed no objective evidence of a harmful change.

Dr. Best prepared a supplemental report, dated May 18, 2009, after viewing a surveillance video of the claimant taken on October 18, 2008 and October 24, 2008. The report notes that the video shows her “shopping and performing all activities of daily living without difficulty;” using her right shoulder above chest level repeatedly; demonstrating excellent strength when lifting and holding a rug with her right arm at shoulder height; and using her right arm to push items on a clothing rack. He included a frame from the video that he considered to be “most telling” because it showed her performing

overhead activities using the right arm and noted subsequently that she did so without restriction. He concluded that the video supported his previous opinion that she sustained no permanent impairment to her shoulder and required no restrictions based on the shoulder.

Dr. Ruth, a forensic psychiatrist, evaluated the claimant for the employer in August 2008. He diagnosed post-traumatic stress disorder due to the workplace incident and assigned a 10% impairment rating. When informed of the claimant's treatment with psychotropic medication for pre-menstrual symptoms, he stated that treatment for pre-menstrual syndrome would not necessarily exclude a history of pre-existing psychiatric problems. He noted that the claimant reported taking medication for stress in the past.

Dr. Shraberg, a clinical psychiatrist and neurologist, evaluated the claimant in October 2008 for the employer. She complained of nightmares and flashbacks since the workplace incident and reported that she had never experienced or taken medication for psychiatric symptoms previously. Dr. Shraberg noted, however, that Drs. Stumbo and Varia had prescribed medication for anxiety and depression since at least 1999. He diagnosed a mild-moderate pre-existing anxiety disorder and opined that the work event might have exacerbated the disorder temporarily but that the claimant had since returned to her pre-injury level of symptoms.

The parties stipulated among other things that the employer paid nearly \$44,000.00 in temporary total disability benefits voluntarily from October 30, 2007 through February 18, 2009 and also paid nearly \$28,000.00 in medical

expenses. The contested issues included, among other things, whether the claimant sustained a work-related physical or psychological injury as defined by KRS 342.0011(1) and, if so, the extent and duration of any resulting disability.

The claimant asserted that the effects of her physical and psychological injuries rendered her permanently and totally disabled. She relied on extensive testimony from her longstanding gynecologist, Dr. Varia, to refute the employer's allegation that she knowingly concealed previous treatment for depression and anxiety and to relate the cause of her present psychological symptoms to the work-related incident. Dr. Varia testified that the claimant was prescribed psychotropic medication to treat pre-menstrual syndrome.

The employer argued that the claimant attempted to conceal extensive previous treatment for right shoulder, neck, gastrointestinal, and psychological symptoms from Drs. Templin and Granacher, which tainted their opinions concerning causation. Asserting that only Drs. Jenkinson, Best, and Shraberg premised their opinions concerning the cause of the alleged physical injuries on a complete and accurate medical history, the employer maintained that the tainted opinions could not constitute substantial evidence of causation as a matter of law. The employer concluded that the claimant's present complaints resulted entirely from pre-existing active conditions and were "unaltered by the effects of the October 29, 2007 alleged event."

I. THE ALJ'S DECISION.

The ALJ found that the claimant sustained physical and psychological injuries from being “repeatedly pushed into the door/doorway by the unruly child, and then kicked and stomped.” The ALJ found Dr. Templin’s opinions concerning the cause of the alleged cervical and right shoulder injuries to be unreliable because he did not receive a complete and accurate history and, as a consequence, relied on the opinions of Drs. Best and Jenkinson. Noting that both Dr. Shraberg and Dr. Granacher distinguished treatment for pre-menstrual symptoms from treatment for anxiety, the ALJ relied on Dr. Granacher to determine that the work-related incident caused psychological harm that produced a 15% permanent impairment rating and prevented the claimant from working as a special education teacher. Convinced that the claimant was only partially disabled, the ALJ noted that she was only 44 years old, highly educated, and presented herself very well and that vocational evidence showed she could perform many types of work.

The ALJ awarded TTD benefits as paid voluntarily from October 30, 2007 through February 18, 2009; triple partial disability benefits based on the 15% permanent impairment rating assigned by Dr. Granacher; and future medical benefits for “the effects of her work-related injury.”

The claimant’s petition for reconsideration alleged a patent error in the failure to find a right shoulder injury that warranted a permanent impairment rating, arguing that she underwent surgery due to the effects of the work-related incident. She also alleged that the ALJ erred by finding the opinions of

Drs. Jenkinson and Best to be most persuasive because there was no conclusive proof of an active pre-existing shoulder condition. A petition by the employer requested that medical benefits be limited to the effects of the psychological injury. The ALJ denied both petitions summarily.

II. THE BOARD'S DECISION.

The claimant argued on appeal that the ALJ erred by finding that she sustained physical injuries in the work-related incident and awarding medical benefits for her work-related injuries but by relying on opinions from the employer's medical experts that any permanent impairment from the conditions existed before the injury. She maintained that there was no evidence of a pre-existing active impairment rating and that she was entitled to permanent income benefits for the injuries.

The employer cross-appealed,² asserting that substantial evidence and a correct application of legal principles supported the ALJ's refusal to award income benefits for the alleged physical injuries. The employer reasoned that the claimant sustained no more than minor, temporary physical injuries and failed to meet her burden of proving a work-related neck, right shoulder, or gastrointestinal injury. The employer also maintained that the ALJ acted properly in failing to award future medical benefits for the alleged injuries. The Board disagreed.

² The Board's opinion makes no reference to the cross-appeal. The record indicates, however, that the employer submitted a notice of cross-appeal, which the Board acknowledged and filed on January 8, 2010.

The Board vacated the decision with respect to the shoulder and gastrointestinal conditions based on the ALJ's failure to consider the evidence under *Finley*.

Appealing the Court of Appeals' decision to affirm, the employer raises two arguments: 1.) that the Board erred by directing the ALJ to adopt its interpretation of Dr. Best's opinion concerning the right shoulder condition; and 2.) that the Board and the Court of Appeals misinterpreted *Finley* and "put the cart before the horse" by requiring the employer to prove a pre-existing active shoulder condition although substantial evidence supported the ALJ's conclusion that no work-related shoulder injury occurred.

III. ANALYSIS.

The employer maintains that the most reasonable interpretation of the ALJ's decision is that the claimant sustained sufficient minor, temporary "physical injuries" in the workplace incident to support her psychological claim³ but failed to prove causation with respect to any specific physical injury. Thus, *Finley* is inapplicable.

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 evidenced by objective medical findings. Moreover, it requires a psychological, psychiatric, or stress-related change to result directly from a physical injury, *i.e.*, from a physically traumatic event.⁴ Impairment from a

³ See *Lexington-Fayette Urban County Government v. West*, 52 S.W.3d 564 (Ky. 2001).

⁴ *Id.*

pre-existing condition must be excluded from an award because, to the extent that the condition was symptomatic and impairment-ratable immediately before the traumatic event occurred, the traumatic event did not cause the impairment.

An injured worker has the burden to prove every element of a worker's compensation claim, including causation.⁵ Only after a worker offers evidence of an alleged work-related injury does the burden shift to the employer go forward with substantial evidence that the harm was only temporary, such as occurred in *Robertson v. United Parcel Service*,⁶ or with evidence that part or all of the harm was not work-related because it was symptomatic and impairment-ratable immediately before the traumatic event occurred. When an employer offers such evidence, the ultimate burden of proving the extent to which the harmful change is work-related remains on the claimant. A decision that favors the party with the burden of proof must be affirmed if supported by substantial evidence.⁷

The Board erred by remanding for further analysis with respect to the alleged shoulder injury but for reasons other than those stated by the employer. Causation is a medical issue. The ALJ noted when considering the conflicting medical evidence that only Drs. Jenkinson and Best received a complete and accurate history and, thus, rejected Dr. Templin's opinion of

⁵ See *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).

⁶ 64 S.W.3d 284 (Ky. 2001).

⁷ *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

causation as being unreliable. The ALJ exercised reasonable discretion in doing so. Not only did Dr. Templin base his opinion on a medical history that failed to include either the claimant's longstanding treatment for shoulder complaints or the pre-injury MRI,⁸ Dr. Best explained why the actual history was critical to an accurate opinion of causation in this case.

The ALJ awarded TTD as paid voluntarily and no existing medical expense was in dispute. The ALJ's analysis may have been a bit unclear, but the evidence required no further consideration concerning a temporary injury or the claimant's entitlement to future medical benefits. The evidence would not have supported such an award because no physician who received an accurate medical history opined that the workplace incident caused or would cause any shoulder complaints for which she remained uncompensated. Likewise, the evidence would not have supported an award of permanent income benefits because no competent medical evidence showed that the workplace incident caused a permanent harmful change to the claimant's shoulder. Nothing required further analysis.

The Board also erred by remanding with respect to the gastrointestinal disturbance but again for reasons different from those raised by the employer. The claimant offered substantial evidence of causation with respect to the gastrointestinal disturbance from Dr. Granacher. Although she failed to reveal

⁸ *Cepero v. Fabricated Metals*, 132 S.W.3d 839 (Ky. 2004) (a medical opinion based on a substantially inaccurate medical history and unsupported by other credible evidence cannot constitute substantial evidence); *Osborne v. Pepsi-Cola*, 816 S.W.2d 643, 647 (Ky.1991) ("If the history is sufficiently impeached, the trier of fact may disregard the opinions based on it. After all, the opinion does not rest on the doctor's own knowledge....").

her previous treatment with psychotropic medication, he testified when informed of the treatment that the work-related incident was sufficient to induce the present anxiety regardless of any previous anxiety associated with a pre-menstrual syndrome. He stated that the gastrointestinal condition was psychophysiologic and “due to [the] anxiety disorder caused by [the] workplace injury.” In other words, he considered the condition to be a symptom of the anxiety disorder rather than a distinct physical injury. Moreover, he based a portion of the 15% permanent impairment rating that he assigned to the anxiety disorder on Chapter 13 of the *Guides*. Chapter 13 concerns the central and peripheral nervous system and includes anorectal system neurologic impairments.

Dr. Granacher’s testimony shifted to the employer the burden to offer evidence that part or all of the claimant’s psychological condition was not compensable. The employer did so, but the ALJ found Dr. Granacher’s testimony to be more persuasive and awarded benefits based on a 15% impairment rating without excluding impairment from a prior, active condition. Mindful of his testimony that the work-related incident was sufficient to induce the present anxiety regardless of any previous anxiety, we conclude that the decision favoring the claimant was reasonable under the evidence and should have been affirmed on appeal.⁹ The employer’s evidence that part or all of the condition was non-compensable, was not so overwhelming as to compel a decision in its favor.

⁹ *Id.*

The decision of the Court of Appeals is reversed and the decision of the ALJ is reinstated.

All sitting. All concur.

COUNSEL FOR APPELLANT,
KNOTT COUNTY BOARD OF
EDUCATION:

Stephanie Dawn Ross
Gregory Lonzo Little
Ferreri & Fogle, PLLC
300 East Main Street
Suite 400
Lexington, KY 40507

COUNSEL FOR APPELLEE,
LOIS HAMILTON:

Glenn Martin Hammond
Todd Patrick Greer
Glenn M. Hammond Law Offices
P.O. Box 1109
Pikeville, KY 41502