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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: SEPTEMBER 26, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000675-WC

AMERIGAS PARTNERS, LP — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2011-CA-001565-WC
WORKERS' COMPENSATION NO. 02-66021

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

MEMORANDUM OPINION OF THE COURT

REVERSING

Appellant, Amerigas Partners, LP, appeals from a decision of the Court of Appeals which held that Appellee, Floyd Nivison, had a compensable work-related psychiatric injury. Amerigas argues that the Court of Appeals lacked the discretion to overturn the Administrative Law Judge's ("ALJ") decision, which found that Nivison did not have a compensable psychological impairment, because it was based on substantial evidence of record. For the reasons stated below, we reverse the Court of Appeals.

Nivison sustained two work-related injuries while working for Amerigas. Nivison's first injury occurred in December 2001, when he fell against a hand cart. He received treatment for pain in his lower back, leg, and groin and by

May 2002 was able to resume all job duties without assistance. The second injury occurred on May 6, 2002, as Nivison was lifting a propane gas cylinder. As he was lifting the cylinder, Nivison experienced what he described as an "awful, sharp, hot just stabbing shooting pain" in his lower back. Amerigas placed Nivision on light work duty until July 2002 when he was taken off work completely. Nivison filed a claim for workers' compensation benefits and was examined by several doctors. As part of his claim, Nivision alleged that he not only had permanent total physical impairment but also had a compensable work-related psychological impairment.

Following a hearing, the ALJ issued an opinion and award finding that Nivison has an 11.5% impairment rating, and is entitled to the triple income multiplier pursuant to KRS 342.730(1)(c). The ALJ awarded Nivison permanent partial disability benefits consistent with those findings. These findings have not been appealed to this Court.

The ALJ also held that Nivison had not shown the existence of a work-related psychological impairment. In so finding, the ALJ relied on the opinion of Dr. Timothy Allen. Dr. Allen examined Nivison on behalf of Amerigas on March 31, 2010. On the Form 107 he filled out several weeks later, Dr. Allen checked "yes" by the following question: "Plaintiff had an active psychological impairment prior to the injury?" After answering yes to that question, Dr. Allen wrote that he believed Nivison suffered from "Depressive Disorder NOS" and that 5% of the psychological impairment pre-existed the work-related accident and 5% was due to non-work related subsequent events. The ALJ adopted

these findings and held Nivison did not have a compensable work-related psychological impairment. The Workers' Compensation Board affirmed.

The Court of Appeals affirmed the workers' compensation award connected with Nivison's physical injuries, but reversed the portion of the ALJ's order denying compensation for his psychological impairment. The majority believed that Dr. Allen's deposition testimony indicated he changed his mind about the nature of Nivison's psychological impairments. That testimony, given after Dr. Allen submitted the Form 107, was as follows:

> Q: Do you think that [Nivison] had a rateable [*sic*] psychiatric condition back in January of 2002?
> A: No.
> Q: No. So he didn't have any active problems?
> A: Correct.
> . . . .
> Q: All right. Just to try to get a handle on all this, and correct me if I say anything that's incorrect, but you testified up until [Nivison] hurt himself in 2002, he was sound of mind and body in your opinion?
> A: Right. But clearly he had a preexisting condition that was I believe probably dormant at that point.

The Court of Appeals noted that Dr. Allen's deposition testimony contradicted his prior independent psychiatric examination finding and his opinions in his Form 107. Therefore, the majority concluded that at least part of Nivison's psychiatric impairment was compensable. In so doing, the majority noted that *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000) allows an ALJ to "reject any testimony and believe or disbelieve various parts of the evidence[.]" Yet, the majority went on to opine that *Magic Coal* does not permit an ALJ to disregard clear and unequivocal evidence, like the deposition testimony of Dr. Allen.

Chief Judge Acree dissented from the majority believing that they misapplied *Magic Coal.* He stated:

> [t]he Supreme Court said in *Magic Coal* that '[w]here the question at issue is one which properly falls within the province of medical experts, the fact-finder may not disregard the *uncontradicted* conclusion of a medical expert and reach a different conclusion.' *Magic Coal,* 19 S.W.3d at 96 (citing *Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc.*, 618 S.W.2d 184 (Ky.App. 1981)(emphasis added). The Court also said a medical expert's conclusion 'may not be disregarded by the fact-finder *unless it is rebutted.*' *Magic Coal,* 19 S.W.3d at 97 (emphasis added). The negative inference to be drawn from these and other statements in the opinion is that the fact-finder has the authority to disregard contradicted conclusions of a medical expert and reach a different conclusion, as long as that different conclusion is itself supported by substantial evidence. *Id.* at 96 ('The fact-finder 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.' (citation omitted)).

Thus, Chief Judge Acree believed that since "substantial evidence . . . supported both sides of the question whether Nivison's pre-existing condition was dormant" the ALJ properly applied *Magic Coal,* by selecting the substantial evidence that supported his conclusion while disregarding the evidence which supported the opposite conclusion. Chief Judge Acree also noted that Dr. Allen stated multiple times during his deposition that he believed none of Nivison's psychological impairment was work-related.

We agree with Chief Judge Acree's dissent. The ALJ apparently found that Dr. Allen's Form 107 was more persuasive than his deposition testimony, which contradicted those findings. The ALJ had the right to do so because he has the sole discretion to determine the quality, character, and substance of the evidence and to draw reasonable inference from that evidence. *Paramount*

Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Further, the 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. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

Here, Dr. Allen did provide testimony which could support a belief that he changed his mind about whether Nivison's psychological impairment was work-related. But, he also testified multiple times during the same deposition that he did not believe any of Nivison's psychological impairment was attributable to his work-related injuries. Thus, the Court of Appeals incorrectly found that Dr. Allen's deposition provided *clear and convincing* evidence that Nivison's psychological impairment is work-related. If anything, the testimony was contradictory. Faced with such evidence, the ALJ has the discretion to "reject any testimony and believe or disbelieve various parts of the evidence." *Magic Coal,* 19 S.W.3d at 96. The ALJ chose to believe Dr. Allen's testimony that Nivison's psychological impairment, whether pre-existing active or dormant, is not work-related. It was within his discretion to make that choice and, because Dr. Allen's testimony was evidence of substance, the ALJ must be affirmed.

For the reasons set forth above, we reverse the portion of the Court of Appeals opinion regarding Nivison's psychological impairment and reinstate the Administrative Law Judge's opinion and award.

All sitting. All concur.

COUNSEL FOR APPELLANT,
AMERIGAS PARTNERS, LP:

Jo Alice Van Nagell
Lori VanHoose Daniel

COUNSEL FOR APPELLEE,
FLOYD NIVISON:

Roy Church Gray, III