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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE  
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# Supreme Court of Kentucky

2013-SC-000256-WC

CASTELLINI COMPANY

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS  
CASE NO. 2012-CA-001548-WC  
WORKERS' COMPENSATION NO. 09-77799

JOSHUA CROSS;  
HONORABLE R. SCOTT BORDERS,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

Appellant, Castellini Company, appeals from a Court of Appeals decision which affirmed a workers' compensation award in Joshua Cross's favor. Castellini presents the following arguments on appeal: 1) that the Administrative Law Judge ("ALJ") erred by adopting Dr. Kelly's impairment rating for Cross's spinal injury because it was determined by using the range-of-motion ("ROM") method; 2) that Cross's award of vocational rehabilitation should be vacated because he can perform light duty work; and 3) that the Workers' Compensation Board erred in awarding disputed temporary total disability ("TTD") payments for Cross. For the following reasons, we affirm the Court of Appeals.

Cross suffered a work-related lumbar spine injury on July 6, 2009, while lifting a box of produce. As he lifted the box, Cross immediately felt a sharp pain in his back that radiated down his right leg. Cross was taken to the hospital where he was diagnosed with a pulled muscle and prescribed pain medications and anti-inflammatories. He subsequently underwent physical therapy which did not alleviate his symptoms. Cross began treatment with Dr. John Kelly in September 2009, who diagnosed him with lumbar disc protrusion and lumbar radiculopathy. However, due to Cross's obesity and tobacco use, he is ineligible for surgery to fix his spine. Cross continued treatment with Dr. Kelly. Castellini paid TTD benefits from July 7, 2009 through July 1, 2010.

Cross was released to return to work at Castellini on July 1, 2010, with lifting restrictions. He worked a light duty position until September 8, 2010, when, as he was leaving work, he began to suffer unbearable back pain which radiated into his right leg. Cross has not worked since that date, but has looked several times for employment. Due to the pain medication he is taking, Cross is ineligible to return to work at Castellini. Castellini paid TTD benefits to Cross from September 30, 2010 through June 23, 2011. Cross filed an Application for Resolution of Injury Claim on August 15, 2011, based on his work-related lumbar disc protrusions and lumbar radiculopathy.

Cross submitted Dr. Kelly's medical opinion in support of his claim. Dr. Kelly believed that Cross reached maximum medical improvement ("MMI") on September 8, 2011. He assigned Cross a 24% whole person permanent partial

impairment rating attributed solely to the work-related injury suffered on July 6, 2009. In assigning that impairment rating, Dr. Kelly used the ROM method.

In rebuttal, Castellini filed the medical report of Dr. David C. Randolph. Dr. Randolph believed that Cross suffered from degenerative disc disease and degenerative osteoarthritis that were not work-related. However, Dr. Randolph found that Cross suffered from certain disc protrusions (at L4-L5 and L5-S1) that were likely work-related and assigned him a 6% whole person impairment rating. Dr. Randolph also criticized the amount of medical treatment that Cross received and concluded that the only way he could improve his health was to lose weight and abstain from tobacco use.

An evidentiary hearing was held on February 1, 2012. The ALJ concluded that Cross was entitled to additional TTD benefits from September 9, 2010 through September 29, 2010, and from June 24, 2011 through September 8, 2011. He also adopted Dr. Kelly's impairment rating. The ALJ found that Dr. Randolph's impairment rating was unsatisfactory because he believed Dr. Randolph contradicted himself by stating that Cross suffered from disc herniation/protrusions at multiple levels that were work-related, but limited his assessment of functional impairment by using the diagnosis-related estimate ("DRE") model. Dr. Randolph said he used the DRE model because he only found one level of Cross's disc to be symptomatic on examination. Cross was awarded benefits based on Dr. Kelly's assessment.

Cross was also awarded vocational rehabilitation benefits. The ALJ observed that:

Mr. Cross testified that he has worked primarily as a laborer since leaving high school. He has worked in a machine shop operating machines for both his father and his brother, and has worked unloading trucks at Kohl's Department Store and since October 2005 for Castellini Company. These jobs have required him to be capable of lifting over 50 pounds on occasion and to work on his feet most of the day. The parties have stipulated that Mr. Cross does not retain the physical capacity to return to this type of work. In addition, it appears it would be difficult, if not impossible, based on the restrictions assessed him by Dr. Kelly for Mr. Cross to be capable of returning to any of the prior jobs [sic] which he had previous training or experience.

Castillini did not file a petition for reconsideration. The Workers' Compensation Board and Court of Appeals affirmed the ALJ's opinion, order, and award. This appeal followed.

**THE ALJ WAS WITHIN HIS DISCRETION TO ASSIGN CROSS AN IMPAIRMENT RATING BASED ON DR. KELLY'S FINDINGS**

Castellini first argues that the ALJ erred by relying on the impairment rating assigned to Cross by Dr. Kelly. Castellini contends that Dr. Kelly used the wrong method to assess Cross's spine impairment because he used the ROM method instead of the DRE method. "The DRE method is the principal methodology used to evaluate an individual who has had a distinct injury. When the cause of impairment is not easily determined and if the impairment can be well characterized by the DRE method, the evaluator should use that method." *Guides* at 379. Castellini believes that the DRE method, which Dr. Randolph used, was the appropriate method of assessment because Cross complained of a single traumatic event, the severe back pain caused by lifting the box of produce. Castellini also argues that the ROM method did not

differentiate or apportion the limited range of motion attributed to Cross's obesity instead of his spinal injury.

The ALJ has the sole discretion to determine the quality, character, and substance of the evidence and may reject any testimony and believe or disbelieve various parts of the evidence regardless of whether it comes from the same witness or from the same party's proof. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985); *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). Where the party with the burden of proof and risk of persuasion is successful before the ALJ, the question on appeal is whether there was some evidence of substance to support the finding in his favor. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986).

In this matter, the ALJ's decision to rely on Dr. Kelly's assessed impairment rating is supported by the record. As observed by the Board:

[t]he totality of the medical evidence reveals nothing more than conflicting evidence in the appropriate method to be used in determining the impairment rating. Since the ALJ has the authority to pick and choose, he was free to rely on Dr. Kelly's impairment rating as more credible and this Board is not authorized to disturb that choice on appeal.

There was agreement Cross has sustained a physical injury. Dr. Kelly explained his reasons for opining Cross had a 24% impairment as a result of the work injury. Further, the ALJ considered the opinions of Dr. Randolph and sufficiently explained why he chose to disregard his opinion and rely on the opinions of Dr. Kelly. Since the decision of the ALJ is supported by substantial evidence, it will not be disturbed on appeal.

We agree with this reasoning, and affirm the Court of Appeals on this issue.

**THE ALJ'S FINDING THAT CROSS IS ENTITLED TO VOCATIONAL REHABILITATION IS SUPPORTED BY THE RECORD**

Castellini next argues that Cross's award of vocational rehabilitation should be vacated because he can perform light duty work. Cross is a high school graduate who has taken a few semesters of college education. According to the work restrictions placed upon him, he is capable of lifting up to twenty-five pounds, making him eligible to work at certain types of businesses but not Castellini due to his pain medication. Cross testified that he had applied for jobs which do not require lifting at employers such as Fifth Third Bank, Verizon, Cingular, AT&T, Macy's and Fidelity. However, Cross was not hired for any of these positions. Castellini also believes that Cross's unhealthy lifestyle, in particular his obesity, sabotages his chances for obtaining employment.

KRS 342.710(3) provides that a claimant is entitled to vocational rehabilitation benefits "[w]hen as a result of the injury he or she is unable to perform work for which he or she has previous training or experience . . . ." The ALJ awarded Cross vocational rehabilitation benefits because his only experience was working jobs which involved strenuous manual labor. Both parties agree that Cross cannot return to that type of work. Cross does not have any experience or training in jobs that do not involve manual labor. Thus, the ALJ's finding that Cross needs additional experience or training to reenter the workforce in a different capacity is not unreasonable. Further, the record reflects that Cross was successfully losing weight prior to reinjuring his back.

His current physical condition makes regular exercise difficult, and thus Castillini's contention that Cross is purposefully living an unhealthy lifestyle which diminishes his employability fails.

**CROSS'S AWARD OF ADDITIONAL TTD INCOME BENEFITS WAS SUPPORTED BY THE RECORD**

Castillini's final argument is that the ALJ erred by awarding Cross additional TTD income benefits. Castillini paid Cross TTD income benefits from July 7, 2009, through July 1, 2010, and again from September 30, 2010, through June 23, 2011. The ALJ in reviewing the record awarded Cross additional TTD benefits from September 9, 2010, through September 29, 2010, and from June 24, 2011, through September 8, 2011. The additional TTD income benefit payment for September 2010 reflects the time period in which Cross experienced severe back pain up to the time he saw a doctor for his condition. The additional TTD income benefit payment awarded for 2011 reflects the time period between the date Castillini stopped paying TTD income benefits to the date which Dr. Kelly found Cross reached MMI.

KRS 342.0011(11)(a) defines TTD as "the condition of an employee who has not reached [MMI] from an injury and has not reached a level of improvement that would permit a return to employment." Thus, before awarding TTD benefits an ALJ must find that both elements of the statute are met. See *Magellan Behavioral Health v. Helms*, 140 S.W.3d 579 (Ky. App. 2004).



Castellini argues that Cross is not entitled to the additional TTD income benefits for the period between September 9, 2010, through September 29, 2010, because of the long delay between the last day he worked due to his injury and the date he finally visited a doctor. However, the record reflects that Cross could not get an appointment with Dr. Kelly until September 29, and the ALJ found Cross's testimony credible in regards to that delay. The ALJ did not abuse his discretion in granting Cross these additional TTD income benefits.

Castellini also argues that Cross should not have received the additional TTD income benefits for the period from June 24, 2011 to September 8, 2011. But the ALJ, after reviewing the evidence, found that Dr. Kelly's determination that Cross did not reach MMI until September 8, 2011, was credible and the TTD income benefits were awarded accordingly based on that finding. Again, the ALJ did not abuse his discretion.

### **CONCLUSION**

For the above stated reasons, we affirm the decision of the Court of Appeals.

All sitting. All concur.

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