

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NOT TO BE PUBLISHED OPINION

**THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED."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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE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UNPUBLISHED KENTUCKY APPELLATE DECISIONS,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BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED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

2013-SC-000334-WC

KEVIN WATKINS

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS
CASE NO. 2012-CA-001482-WC
WORKERS' COMPENSATION NO. 08-73193

KOBE ALUMINUM USA, INC.;
HONORABLE DOUGLAS GOTT,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Kevin A. Watkins, appeals from a Court of Appeals decision which affirmed an opinion of the Workers' Compensation Board that vacated his workers' compensation award. The Board vacated Watkins's award and remanded the matter for the Administrative Law Judge ("ALJ") to provide additional support as to why he assigned a 20% impairment rating to Watkins for gait impairment and whether that rating complies with the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition*. Watkins argues that the Board exceeded its authority and improperly interfered with the ALJ's role as fact finder. For the reasons set forth below, we affirm the Court of Appeals.

Watkins was employed by Appellee, Kobe Aluminum, when he suffered a work-related accident in 2008 which injured his lower back, left hip, and left leg. In 2010, he allegedly re-aggravated the injuries from the earlier incident while working on a press machine at Kobe Aluminum. Watkins stopped working after the 2010 incident and was terminated from his job. Watkins filed a workers' compensation claim.

Watkins presented evidence from three doctors in support of his claim – Dr. Gregg Malmquist, Dr. Colin Looney, and Dr. Richard Sheridan. Only Dr. Looney assigned Watkins an impairment rating – 20% for gait impairment. Kobe Aluminum filed the report of Dr. John Stanton who disagreed with Dr. Looney's impairment rating because it was based on gait deformity. Dr. Stanton noted that gait impairment was not previously diagnosed in Watkins's medical records or present when he examined Watkins.

The ALJ found that Dr. Looney's opinion was the most persuasive and assigned Watkins the 20% impairment rating. Dr. Looney's final medical report stated in pertinent part:

[Watkins] has significant hip pathology which will certainly be activity limiting. My hope is with this procedure we can buy him about three to four years before we have to proceed toward arthroplasty. I suspect that we can get this and he is in agreement, but nonetheless he has significant changes throughout his hip and he has a labral tear as well. What I have suggested is at this [point] that we have reached our impairment rating and to conclude the postoperative evaluation with an impairment rating. I also suggested that he should at this point avoid any work that involves bending, squatting, ladders, picking up objects heavier than 20 pounds, repetitive deep hip flexion as I think this will aggravate his condition. A more sedentary job would be appropriate for him and I have recommended this. We have talked about vocational training, but it does not sound like we have made

much headway in this regard. Because [Watkins] is from Kentucky, we will use the Fifth Edition of the *AMA Guides to Permanent Impairment* and based on the information in this edition I made my assessment of impairment based on page 529 of the *Guide to Evaluation of Permanent Impairment, Fifth Edition*. This was largely due to a lower limb impairment due to gait derangement as well as early arthritis. His impairment rating of the whole person is 20 percent. The early arthritic change would result in an impairment of 3 percent of whole person and that is according to table 17.3 noted on page 527, but [due to] the gait derangement a higher rating is given based on table 17.5 where he has significant gait disturbance and pain secondary to his hip. This also takes into account as hip continues to deteriorate he may need a total hip arthroplasty in the future. Based on this, I have arrived at a whole person impairment of 20 percent.

Kobe Aluminum filed a petition for reconsideration which argued that the impairment rating Dr. Looney assigned Watkins was not in compliance with the *AMA Guides*. Kobe Aluminum argued that Dr. Looney improperly utilized Table 17-5 of the *Guides* to determine that Watkins had a 20% impairment rating for gait disturbance. To receive that impairment rating under Table 17-5, there must be evidence that the claimant “requires routine use of cane, crutch, or long leg brace (knee-ankle-foot orthosis [KAFO]).” Kobe Aluminum contended that there was no evidence in the record that Watkins required or even used a walking aid device, and thus he could not be assigned that impairment rating. The ALJ denied the petition for reconsideration without specifically addressing Kobe Aluminum’s argument regarding the *AMA Guides*.

Kobe Aluminum appealed to the Board who vacated the ALJ’s opinion, order, and award in part¹ and remanded the matter for further proceedings.

¹ The Board only vacated the portions of the ALJ’s opinion, order, and award and the order denying the petition for reconsideration which stated that Watkins has a 20% impairment and the permanent partial disability benefits based on that rating.

The Board believed Kobe Aluminum presented a sufficient argument for the ALJ to address whether the 20% impairment rating complied with the *Guides*.

In so doing the Board stated:

As set forth in the May 6, 2011, report, Dr. Looney cited to Table 17-3 of the AMA Guides, 'Whole Person Impairment Values Calculated From Lower Extremity Impairment,' to assess a 3% whole person impairment. However, Dr. Looney did not assess a lower extremity impairment rating in the May 6, 2011, report. Additionally, it appears Dr. Looney exclusively relied upon Table 17-5, 'Lower Limb Impairment Due to Gait Derangement,' to assess a 20% whole person impairment. This is unclear from Dr. Looney's report, as he never directly states the 20% impairment rating is derived exclusively from Table 17-5. Nevertheless, we assume the 20% whole person impairment rating is based on Table 17-5. As noted in the Guides, '[e]xcept as otherwise noted, the percentages given in Table 17-5 are for full-time gait derangements of person [?] who are dependent on *assistive devices*.' (emphasis in original). An assessment of a 20% whole person impairment pursuant to Table 17-5 '[r]equires routine use of [a] cane, crutch, or long leg brace (knee-ankle-foot orthosis [KAFO]).' However, a review of Watkins' [sic] deposition and hearing testimony reveals no testimony regarding Watkins' [sic] use of an assistive device. Additionally, there is no recommendation of assistive devices within Dr. Looney's May 6, 2011, report.

The Court of Appeals affirmed the Board. Watkins filed the present appeal.

Watkins argues that the Board overstepped its bounds by vacating the ALJ's opinion, award, and order and remanding this matter for the ALJ to provide support for his conclusion that the 20% impairment rating was appropriate. He contends that the Board incorrectly assumed that Dr. Looney used Table 17-5 as the sole basis to assign a 20% impairment rating for gait impairment. Watkins argues that Dr. Looney relied on other factors than Table 17-5 such as the pain Watkins suffered, his gait, and certain degeneration. Thus, Watkins concludes that the Board impermissibly interfered with the

ALJ's role as fact finder and there is no substantial evidence to vacate his order. We disagree.

We acknowledge that an ALJ has the sole discretion to determine the quality, character, and substance of the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985). An ALJ may not question a medical expert's interpretation of the *Guides*, but may only determine which expert's findings he finds to be most credible. *Brown-Forman Corp. v. Upchurch*, 127 S.W.3d 615, 621 (Ky. 2004). However, the ALJ is constrained by KRS 342.730(1)(b) which states that an award for permanent partial disability benefits must be calculated by using a "permanent impairment rating caused by the injury or occupational disease *as determined by the 'Guides to the Evaluation of Permanent Impairment'* . . ." (Emphasis added). "An ALJ cannot choose to give credence to an opinion of a physician assigning an impairment rating that is not based upon the *AMA Guides*." *Jones v. Brasch-Barry General Contractors*, 189 S.W.3d 149, 153 (Ky. App. 2006). "[A]ny assessment that disregards the express terms of the *AMA Guides* cannot constitute substantial evidence to support an award of workers' compensation benefits." *Id.* at 154.

In this matter, Kobe Aluminum raised a question of whether the impairment rating Dr. Looney assigned Watkins complies with the *AMA Guides*. Watkins's argument that the Board incorrectly assumed Dr. Looney used Table 17-5 in making his conclusion fails. In his report, Dr. Looney stated that according to Table 17-5 Watkins was entitled to a higher impairment rating than if he was assessed under Table 17-3. Further, the 20% impairment rating

assigned to Watkins is a rating found under Table 17-5. Thus, it is reasonable to believe that Dr. Looney used Table 17-5 in determining Watkins's impairment rating. Per Table 17-5, to assign a 20% impairment rating the injured individual must "require[] routine use of cane, crutch, or long leg brace (knee-ankle-foot orthosis [KAFO])." Since it is not clear from the ALJ's opinion that Watkins uses such a device, Kobe Aluminum is entitled to additional support and fact finding. While Dr. Looney may have determined Watkins's impairment rating based on factors outside of Table 17-5, this does not change the fact that the rating must ultimately comply with the *AMA Guides*. We note that on remand, we are not requiring the ALJ to perform a medical analysis, but only to address the issue raised and determine whether there is support in the record for a 20% impairment rating for gait impairment per the *AMA Guides*.

Thus, for the above stated reasons, we affirm the decision of the Court of Appeals:

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ. sitting. All concur. Keller, J., not sitting.

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