

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED."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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE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UNPUBLISHED KENTUCKY APPELLATE DECISIONS,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BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED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

2013-SC-000488-WC

DATE 10-9-14 ELLAGROU, D.C.

MARIA PRESTON

APPELLANT

V.
ON APPEAL FROM COURT OF APPEALS
CASE NO. 2013-CA-000280-WC
WORKERS' COMPENSATION NO. 11-90258

MARCO INDUSTRIAL TIRE CO.;
HONORABLE GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Maria Preston, appeals from a Court of Appeals decision which affirmed the denial of workers' compensation benefits for an alleged work-related lumbar spine injury. Preston argues that the Administrative Law Judge ("ALJ") erred by finding that her lumbar spine returned to its baseline condition after she suffered a work-related fall and that he should have applied *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App. 2007), because she had a pre-existing condition. For the below stated reasons, we affirm the Court of Appeals.

Preston is employed as an office manager for Appellee, Marco Industrial Tire Co. On May 10, 2010, Preston slipped and fell on a wet staircase, but

returned to work without medical treatment. On November 1, 2010, Preston again slipped and fell on a staircase, injuring her left knee. She received treatment at an emergency room and missed a few days of work. On April 22, 2011, Preston tripped and fell over a forklift, which she alleges aggravated her previous injuries. Preston filed a Form 101, Application for Resolution of Injury Claim, on January 3, 2012, alleging that the three falls caused work-related injuries to her right and left shoulder, right and left knee, chin, wrist, hips, and lower back. She previously underwent left knee surgery in August 2011 after a series of steroid injections failed to provide relief. The surgeon, Dr. Kevin Pugh, assigned Preston a 4% whole person impairment (“WPI”) on her left knee, attributable to a work-related injury.

In March 2012, Preston was treated by Dr. Ira Potter for back pain. He diagnosed Preston with “cervicalgia, lumbar sprain/strain, left lumbar radiculitis, left sided L4-5 [and] L5-S1 disc protrusion/herniations, L4-5 [and] L5-S1 degenerative disc disease, and status post left knee arthroscopy (10-13-11) – partial medial & lateral meniscectomies” caused by her work-related falls. Dr. Potter assigned a 7% lumbar WPI and a 4% left lower extremity regional impairment for a total 11% WPI. He concluded that her lumbar spine impairment was caused by the May 2010 fall and was aggravated by the April 2011 fall.

Preston was also evaluated by Dr. David Muffly. However, unlike the medical information she gave Dr. Potter, Preston informed Dr. Muffly that she was involved in a motor vehicle accident in 2005 which led to a history of neck,

left shoulder, and lower back injuries. Based on that information, Dr. Muffly reviewed the records of Dr. Sujata Gutti who treated Preston's injuries from the motor vehicle accident. Dr. Muffly also reviewed an MRI Preston underwent in 2006. That lumbar MRI revealed Preston had a mildly bulging annulus at L4-5 with small hemangiomas within L1, L2, and L3. When the 2006 MRI was compared to one performed on Preston in 2011, Dr. Muffly concluded that she "had a temporary lumbar strain from the 4-22-2011 injury which has not showed [sic] any change to the human organism based on comparison of MRI testing from 2006 and 2011." Dr. Muffly believed that according to the *AMA Guides*, Preston has a 5% impairment to her lumbar spine, but that it was a "pre-existing active impairment" and not work-related. However, he assigned her a 4% WPI for her left knee injury which he found to be work-related.

After a review of the evidence and record, the ALJ concluded that only Preston's left knee injury was work-related. In regards to Preston's lumbar spine injury claim, the ALJ stated:

Having reviewed the evidence of record, the [ALJ] is not persuaded plaintiff has carried her burden of proof with respect to her lumbar claim. In reaching this conclusion, the [ALJ] is fully aware of Dr. Potter's conclusions; however, as the defendant points out, Dr. Potter was not provided accurate information about plaintiff's lumbar complaints following her motor vehicle accident in 2005. A review of Dr. Gutti's records, as well as Dr. Muffly's review of the 2006 MRI compared to the 2011 MRI, and the history obtained by Dr. Muffly all lead the [ALJ] to agree that Dr. Potter was not provided an accurate history. In his report, there is no indication Dr. Potter had been provided all of Dr. Gutti's treatment records or the 2006 MRI report, and it appears plaintiff did not accurately report her prior symptoms as Dr. Potter indicated 'her orthopedic medical history with respect to her lower back and lower extremities is unremarkable for any non-occupational injuries.' This is not an accurate statement since Dr. Gutti's records clearly

show plaintiff complained in 2006 of constant lower back pain with pain into her leg following the August, 2005 motor vehicle accident. For the reasons, the [ALJ] cannot credit Dr. Potter's opinions in this instance.

Instead, Dr. Muffly's assessment is considered most accurate and most in keeping with plaintiff's prior history and diagnostic study results. He concluded plaintiff may have suffered temporary lumbar and cervical strains following the work injuries alleged, but that those conditions returned to baseline and that plaintiff did not therefore suffer any permanent injury other than to her left knee. Based on Dr. Muffly's opinions, it is determined plaintiff's only compensable permanent injury is to her left knee as a result of the work injuries.

Thus, Preston only received temporary medical benefits for her lumbar spine condition. *Robertson v. United Parcel Service*, 64 S.W.3d 284 (Ky. 2001).

Preston filed a petition for reconsideration which was denied.

Preston appealed to the Workers' Compensation Board which affirmed in part and vacated in part and remanded¹ the ALJ's opinion, order, and award. The Board believed that the ALJ's determination that Preston only sustained a temporary lumbar spine injury was not so unreasonable to be reversed as a matter of law. *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000). The Board also held that the ALJ did not have to conduct an analysis pursuant to *Finley*, 217 S.W.3d 261. *Finley* states that "when a pre-existing dormant condition is aroused into disabling reality by a work-related injury, any impairment or medical expense related solely to the pre-existing condition is compensable." *Id.* at 265. The Board held that the ALJ did not need to apply *Finley* because his findings were based on medical evidence that

¹ The Board vacated the award of income benefits to the extent that the ALJ needed to include language regarding the applicability of KRS 342.730(1)(c)2.

Preston's work-related trauma caused no permanent harm to her lumbar spine and there was no overwhelming medical evidence to compel a different result. See *Sweeney v. King's Daughters Medical Center*, 260 S.W.3d 829, 833 (Ky. 2008). The Court of Appeals affirmed in a two to one decision.² This appeal followed.

Preston argues that the ALJ's finding that she only suffered a temporary lumbar sprain from her work-related falls and that she had returned to a baseline condition is unsupported by the record. Because she had the burden of proof before the ALJ, and was unsuccessful, Preston must show on appeal that the evidence was so overwhelming as to have compelled a finding in her favor. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). Mere evidence contrary to the ALJ's decision is not sufficient to mandate reversal of his decision. *Whittaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999).

The ALJ's conclusion that Preston did not suffer permanent damage to her lumbar spine as a result of her falls and that she returned to her baseline condition is supported by the record. He found the report of Dr. Muffly, which found that Preston's lumbar spine condition was pre-existing and not work-related, to be the most accurate and credible. Dr. Muffly's findings are supported by the comparison of the MRIs taken in 2006 and 2011. The ALJ rejected Dr. Potter's report because he was not completely informed of Preston's medical history which included the lower back problems she suffered after her motor vehicle accident in 2005. The ALJ has the discretion to choose which

² Judge Stumbo dissented without opinion.

evidence he finds to be the most persuasive and he did not abuse his discretion in choosing Dr. Muffly's report. *See Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000).

Further, as held by the Board and affirmed by the Court of Appeals, the ALJ did not need to apply *Finley* to Preston's lumbar spine condition. As stated above, *Finley* applies when a pre-existing dormant condition is aroused into a disabling condition as a result of a work-related injury. 217 S.W.3d 265. Here the ALJ found that the work-related trauma Preston suffered was temporary and did not cause any permanent damage to her lumbar spine. Thus, the ALJ did not need to apply the law regarding pre-existing conditions, because he found her work-related falls had no permanent disabling effect on that condition. *See Sweeney*, 260 S.W.3d at 833.

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

All sitting. All concur.

COUNSEL FOR APPELLANT,
MARIA PRESTON:

Thomas Wayne Moak

COUNSEL FOR APPELLEE,
MARCO INDUSTRIAL TIRE CO.:

Katherine Michelle Banks