

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-000593-WC

ROBERT L. WHITTAKER, DIRECTOR OF  
WORKERS' COMPENSATION FUNDS

APPELLANTS

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NOS. WC-94-13266 AND WC-94-49811

LEONARD SPENCER; DIAMOND MAY COAL  
COMPANY; SHEILA C. LOWTHER, CHIEF  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI, McANULTY AND TACKETT, JUDGES.

McANULTY, JUDGE. Robert L. Whittaker, Director of Workers' Compensation Funds (WCF), petitions for review of an opinion of the Workers' Compensation Board, which affirmed the decision of the Chief Administrative Law Judge (CALJ) finding that Leonard Spencer was totally occupationally disabled on reopening of his prior workers' compensation claims, and remanding to the CALJ for more specific factual findings on the amount of credit due the

employer and the WCF for payments under the original award. We affirm.

On November 9, 1994, Spencer was employed by Diamond May Coal Company and suffered a cumulative injury to his back while operating a coal loading machine at work. He experienced such intense back and leg pain with numbness in his right foot that he was unable to continue working. He was hospitalized for several days and was diagnosed with a herniated disk and radiculopathy in his lumbar spine. Dr. Jeffrey Prater, Spencer's family physician, treated him conservatively with medication and physical therapy. After showing some improvement, Spencer was released to return to work in February 1995, but he had to cease working after a few days because of exacerbation of pain and has not returned to work since that time.

On January 3, 1996, the ALJ approved a settlement of Spencer's back claim that called for a lump sum payment of \$29,500 by Diamond May and payment by the Special Fund (now WCF) of \$81.16 per week for 425 weeks representing a 52% occupational disability.

In the summer of 1998, Spencer complained of increased back and leg pain and difficulty in bladder function to Dr. Prater. In August 1998, Spencer was examined by Dr. Russell Travis, an orthopedic surgeon, upon referral from Dr. Prater. Dr. Travis recommended immediate surgery due to a large herniated disk at the L4-L5 level. After performing a discectomy at the L4-L5 level on August 18, 1998, Dr. Travis reported significant improvement in Spencer's bladder function and minimal residual right thigh pain. In November 1998, however, Spencer told Dr.

Travis that he was experiencing severe pain in his lower right leg. An MRI showed no evidence of recurrent disk protrusion, but Dr. Travis suggested posterior lateral interbody fusion may be necessary if Spencer's symptoms did not alleviate after physical therapy.

In March 2000, Spencer voiced complaints to Dr. Prater of increasing back pain. In May 2000, an examination indicated tenderness in his lumbar spine, positive straight leg raise on the right at 60 degrees, and decreased sensation in the right lateral leg and foot. An MRI revealed scar tissue near the L4-L5 level at the site of 1998 surgery. In December 2000, Spencer filed a motion to reopen his prior workers' compensation claim pursuant to Kentucky Revised Statute (KRS) 342.125.

On June 28, 2001, the CALJ conducted a hearing on the motion to reopen. At the hearing, Spencer testified that he wanted and expected to return to work after the 1996 settlement but had been unable to do so because of pain and limitations from his back condition. He said that his condition had worsened despite his participation in physical therapy on a regular basis and use of a TENS unit. Spencer stated that between 1996 and 1998, he experienced an increase in muscle spasms, burning sensations in his leg and foot, and that he had developed bladder problems in the summer of 1998. He indicated that while his bladder problems improved after the surgery, he still has some incontinence. Spencer stated that he currently takes several prescription medicines, one of which has partially relieved his muscle spasms, but still has burning in his foot and constant

pain. He testified that no physician has released him to return to work since 1994, except for the short period in 1995 that proved unsuccessful.

Dr. Prater, who testified by way of deposition, stated that he started seeing Spencer in July 1992 and treated him for a herniated disk in November 1994. He said that Spencer eschewed surgery in favor of more conservative treatment of physical therapy and medication until he started complaining of increased pain and incontinence in 1998. Dr. Prater asserted that the necessity of surgery in 1998 indicated a worsening of Spencer's condition. He stated that while the surgery appeared to have alleviated Spencer's bladder symptoms, he continued to experience numbness and weakness of the right leg, which indicated neuropathy or radiculopathy that he attributed in part to scar tissue from the surgery as shown in an MRI and degenerative disk disease.

Dr. Prater indicated in his deposition and in a document entitled Supplemental Report Reopening-Worsening of Condition that based on his review of the medical records, Spencer's condition had worsened since the settlement in 1996. As support for his opinion, Dr. Prater referred to the urgent 1998 surgery, exacerbation of pain leading to a temporary hospitalization, and persistent scar tissue, which caused pressure on the spinal cord sac and was shown by an MRI. Dr. Prater also said his physical examination of Spencer showed positive straight leg raising, decreased strength, and decreased reflexes consistent with nerve root entrapment. He associated

Spencer's increased problems to his original 1994 injury and did not find any malingering or symptom magnification.

On cross-examination, Dr. Prater stated that the 1998 surgery appeared to have substantially alleviated the bladder incontinence. Dr. Prater admitted that he had not released Spencer to return to work, except for the short trial period in February 1995, and that the restrictions he placed on Spencer in 1995 were substantially similar to those he currently recommended.

The record also included the deposition of Dr. Robert Goodman, an orthopedic surgeon, who examined Spencer in September 1995 and March 2001. He stated that on both occasions, Spencer complained of back and right leg pain but that the pain had increased and he had developed urinary problems. Dr. Goodman testified that in 1995, Spencer had a complete range of motion in the lumbar spine, but more recently had 60 degrees of flexion, 10 degrees of extension, and 20 degrees of lateral bending. He also said that in the initial examination, Spencer had negative straight-leg raising, indicating no nerve pressure, but in 2001, he had a positive straight-leg raising on the right. Based primarily on the 1998 surgical procedure, Dr. Goodman increased Spencer's functional impairment rating under the American Medical Association (AMA) Guidelines from 4% in 1995 to 10% in 2001, half due to arousal of preexisting changes. Although he recommended certain restrictions on lifting, sitting, standing, and exposure to vibrations, Dr. Goodman opined that Spencer could return to his previous job. He admitted that the development of scar

tissue was common following surgery and can cause some increase in pain. He said the existence of scar tissue following surgery was part of the reason for an increase in the impairment ratings under the AMA Guidelines.

Diamond May submitted the report of Dr. Richard Sheridan, an orthopedic surgeon and certified independent medical examiner, who examined Spencer on February 2, 2001. He diagnosed a herniated disc at the L4-L5 level as a result of cumulative trauma between April - November 1994. He assigned a 10% whole-body functional impairment rating and believed Spencer was at maximum medical improvement for his low back problem. He questioned whether Spencer's bladder complaints were referable to either a neurogenic bladder or a cauda equina type situation. Dr. Sheridan opined that Spencer could work with permanent restrictions on lifting, pushing or pulling objects greater than 10 to 15 pounds, no operating vibrating equipment or climbing, and no bending, stooping, rotating at the waist or reaching from floor to waist.

Diamond May also submitted the deposition of Dr. Norman Hawkins, a vocational evaluation expert, taken in November 1995 in association with Spencer's original disability claim. Dr. Hawkins had performed a vocation evaluation in 1994, which included a review of medical records, Spencer's work history, a personal interview, intelligence testing, and achievement testing. Dr. Hawkins stated that based on Spencer's aptitudes and education prior to his injury, he could have performed the duties of approximately 15% of the jobs in his labor market.

Based on the restrictions recommended by Dr. Prater following the 1994 injury, Dr. Hawkins assessed a 100% or total vocational disability in 1995.

On August 27, 2001, the CALJ issued an opinion finding that Spencer had shown a worsening of condition sufficient to support the motion to reopen based on the testimony of Spencer, Dr. Prater, and Dr. Goodman. She found Spencer's claims of increased symptoms, including those necessitating surgery in 1998, to be credible and persuasive. She felt Dr. Prater's testimony that Spencer's condition had worsened and Dr. Goodman's increase in the functional impairment rating and enhanced restrictions supported Spencer's subjective testimony.

With respect to occupational disability, the CALJ referred to Spencer's age (51), his minimal education, lack of specialized training, work history involving jobs requiring physical exertion, and learning disability. She also noted the restrictions recommended by Dr. Sheridan. Based on a totality of the evidence, the CALJ found Spencer to be totally permanently occupationally disabled and apportioned responsibility for payment equally between Diamond May and the WCF beginning December 11, 2000, with credit for benefits heretofore paid.

Subsequently, both Diamond May and the WCF filed petitions for reconsideration seeking additional findings on Spencer's occupational disability as of the date of the 1996 settlement award involving the original claim and challenging the finding of a worsening of condition. On October 9, 2001, the CALJ entered an order stating that the occupational disability

assessment of the original settlement was reasonable and amending the opinion and award on reopening to reflect that Spencer had retained a 52% occupational disability in 1996 as a result of the 1994 injury. She also reaffirmed her findings of a worsening of condition and total permanent occupational disability as of December 2000. On appeal, the Board affirmed the CALJ's finding that Spencer was totally occupationally disabled on reopening, but remanded the case for more specific findings concerning the amount of credit due Diamond May and the WCF for a 425-week period under the original settlement award and the payments for temporary total disability Spencer had received. This appeal followed.

The WCF raises two issues on appeal. First, it challenges the CALJ's finding that Spencer satisfied his burden of proving an increase in occupational disability sufficient to support the motion to reopen. Under KRS 342.125(1)(d), a prior award may be reopened for a change of disability as shown by objective medical evidence of a worsening of impairment due to a condition caused by the injury since the date of the award. The courts have construed KRS 342.125(1)(d) as requiring the party seeking to reopen to make a prima facie or preliminary showing of a change in occupational disability. See Peabody Coal Co. v. Gossett, Ky., 819 S.W.2d 33, 34 (1991); Stambaugh v. Cedar Creek Mining Co., Ky., 488 S.W.2d 681, 682 (1972). In addition to a prima facie showing, a movant seeking an increased award upon reopening bears the burden of proof of a change in occupational disability and the elements supporting a new award. See, e.g.,

Tuttle v. O'Neal Steel, Ky., 884 S.W.2d 661 (1994); Commercial Drywall v. Wells, Ky. App., 860 S.W.2d 299 (1993).

As the fact-finder, the ALJ has the authority to determine the quality, character, and substance of the evidence. Burton v. Foster Wheeler Corp., Ky., 72 S.W.3d 925, 928 (2002). Similarly, the ALJ has the sole authority to determine the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Ky., 951 S.W.2d 329, 331 (1997). The fact-finder also may reject any testimony and believe or disbelieve various parts of the evidence even if it came from the same witness. Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88, 96 (2000). When the decision of the fact-finder is in favor of the party with the burden of proof, the issue on appeal is whether the ALJ's decision is supported by substantial evidence, which is defined as some evidence of substance and consequence sufficient to induce conviction in the minds of reasonable people. Transportation Cabinet v. Poe, Ky., 69 S.W.3d 60, 62 (2001); Whittaker v. Rowland, Ky., 998 S.W.2d 479, 481-82 (1999). The ALJ has broad discretion in determining the extent of occupational disability. Commonwealth v. Guffey, Ky., 42 S.W.3d 618, 621 (2001). Once the medical evidence establishes the existence of an injury, lay testimony of the claimant is competent on the extent of disability. Guffey, supra at 621; Hush v. Abrams, Ky., 584 S.W.2d 48 (1979). A party challenging the ALJ's factual finding must do more than present evidence supporting a contrary conclusion to justify reversal. Poe, supra at 62; Ira A. Watson Dep't Store v. Hamilton, Ky., 34 S.W.3d 48,

52 (2000). As with an initial award, the standard of review for a case involving the reopening of a claim is whether the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.@Rowland, supra at 482(citing Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687 (1992)).

The WCF contends the evidence relied on by the CALJ for her finding of an increase in occupational disability did not support her decision. It maintains that the CALJ's reliance on the testimony of Drs. Prater and Goodman is misplaced. It asserts that Dr. Prater's testimony lacked credibility because it was based on an erroneous belief in the dates of two MRI tests. While Dr. Prater did admit during his disposition that he incorrectly suggested Spencer's incontinence could have been caused by scar tissue because he mistakenly believed the post-operative MRI was performed before the 1998 surgery, he quickly corrected himself and assigned the bladder problem to Spencer's pre-operative herniated disk condition. Dr. Prater acknowledged the 1998 discectomy substantially alleviated the bladder problem, but he opined the scar tissue caused increased pain and numbness. He also stated that his examinations of Spencer in 2000 showing a decrease in Spencer's reflexes and muscle strength, and his muscle spasms, supported his opinion of a worsening of condition. The WCF's intimation that Dr. Prater's momentary confusion discredited his testimony is unpersuasive.

The WCF also attacks the CALJ's reliance on Dr. Goodman's testimony because the physical restrictions he

recommended for Spencer in 2000 did not differ significantly from those he recommended in 1995. Despite this evidence, Dr. Goodman also testified that Spencer's complaint of increased pain was consistent with the presence of scar tissue from the 1998 operation and Spencer's more limited motion and flexibility between the 1995 and 2000 examinations. The CALJ also noted that Dr. Goodman increased Spencer's functional impairment rating from 4% to 10%. The CALJ's finding of increased occupational disability was supported by substantial evidence and the WCF's position merely consists of selective contrary evidence.

The WCF also challenges the Board's order on remand with respect to the credit to be received for payments by it under the initial award. The Board ordered the CALJ to determine the credit based on a 425-week benefit period. The WCF notes that under KRS 342.730(1)(d), as it existed at the time of the injury, provided for payment of benefits for a permanent partial disability exceeding 50% for a 520-week period, while situations of partial disability of 50% or less called for payment of benefits for a 425-week period. Because the CALJ found Spencer was suffering a 52% permanent partial disability at the time of the settlement in 1996, the WCF maintains it is entitled to credit for any overlap between payment of permanent partial disability benefits and the total permanent disability benefits payable under the reopening award based on a 520-week period for partial disability payments. The WCF relies on Whittaker v. Rowland, supra, for its position.

In Rowland, the employee settled his workers' compensation claim with his employer and the Special Fund for a lump sum payment of \$25,646.00 representing a 28.84% occupational disability apportioned 68.5% to the employer and 31.5% to the Special Fund. Upon reopening, the ALJ found the employee 100% occupationally disabled, assessed a 40% permanent partial disability at the time of settlement, and permitted a credit applicable to a permanent partial disability of 40% for a 425-week period following cessation of the temporary total disability payments to the extent it overlapped payments for the total disability award on reopening. The Kentucky Supreme Court affirmed the ALJ's decision and rejected the Special Fund's argument that it was entitled to a credit under the settlement based on a 40% permanent total disability for the entire duration of the reopening award.

We believe the WCF's reliance on Rowland is misplaced because it is distinguishable. Rowland involved solely a lump sum payment that extinguished the liability of both the employer and Special Fund for the initial partial disability award. In order to determine the credit, the ALJ utilized the statutory period in extrapolating the parties' compromised settlement for a lump sum for purposes of determining any overlap between the two awards. There was no dispute over the applicable payment period for assessing credit.

In the case sub judice, the 1996 settlement and award explicitly provided for payment of \$81.16 per week by the Special Fund for 425 weeks representing a 52% occupational disability.

Unlike Rowland, the parties settled the initial claim based on a 425-week payment liability of the Special Fund plus a lump sum payment from the employer. As the court in Rowland stated with respect to determining credit in a reopening involving a settlement agreement in the initial claim, A[c]oordination of the settlement with the award to which claimant became entitled at reopening should both give effect to the settlement and compensate claimant for the increase in his occupational disability which occurred after the settlement.@ Id. at 483. As Spencer points out, under KRS 342.120(8)(b), as it existed at the time of the settlement, the Special Fund's portion of a settled claim was to be paid Over the maximum period provided by the statute for that disability, unless otherwise agreed to by the parties.@ In the current case, unlike Rowland, Spencer and the Special Fund specifically agreed to a payment period of 425 weeks in settling the initial claim. To adopt the WCF's position and allow it a credit based on a 520-week period under the reopening would violate the agreement and provide an unfair windfall to the Special Fund.

In conclusion, we cannot say the Board overlooked or misconstrued controlling statutes or precedent, or committed a flagrant error in assessing the evidence.

For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

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<sup>1</sup> Section 8 of the KRS 342.120 was amended and renumbered effective December 12, 1996. See 1996 Ky. Acts (1<sup>st</sup> Extra Session) Ch. 1 § 3.

BRIEF FOR APPELLANT:

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