

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2002-CA-001301-WC

DELTA ELECTRIC

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-63005

SAM GOODPASTER;
SHEILA LOWTHER, CHIEF
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND HUDDLESTON, JUDGES.

BARBER, JUDGE: The Appellant, Delta Electric ("the employer"), appeals from a decision of the Workers' Compensation Board, affirming the Administrative Law Judge's award of benefits in this June 26, 2000 low back injury claim. Finding no error, we affirm.

We refer to the record only as necessary to resolve the issues before us. The Administrative Law Judge ("ALJ") concluded that the Appellee, Sam Goodpaster ("Goodpaster"), suffered an 8% permanent partial impairment rating, as the result of his work-related injury. The employer contends that Goodpaster failed in

his burden of proving that he sustained any permanency, because Dr. Keisler, upon whom the ALJ relied, attributed the 8% to pre-existing structural and natural aging changes, rather than to the work-related injury.

The standard of review is one of substantial evidence, Goodpaster having prevailed below. It is fundamental that the ALJ has the right to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof.¹

Dr. Keisler's opinion was not the only expert causation opinion of record. According to Dr. Ellen Ballard's August 6, 2001 letter report, "Mr. Goodpaster to my knowledge has not had any documented medical treatment for low back problems prior to his injury of June 26, 2000. Therefore, it is my opinion within reasonable medical probability, . . . that the incident of June 26, 2000, aggravated a pre-existing spondylolisthesis. . . ." Dr. Ballard believed that Goodpaster was at maximum medical improvement in March 2001, and had a 5% impairment, based upon the *AMA Guidelines to the Evaluation of Permanent & Partial Impairment*, Fifth Edition. The ALJ's determination that Goodpaster sustained a permanent impairment

¹ *Caudill v. Maloney's Discount Stores*, Ky., 560 S.W.2d 15 (1977).

as a result of the work-related injury has a substantial evidentiary foundation which we cannot disturb upon appeal.

The employer's second argument -- that the ALJ erred in awarding permanent benefits, because Dr. Keisler would have assigned a zero impairment had he used the fifth edition of the AMA Guidelines, instead of the fourth edition lacks merit.

The employer also asserts that the ALJ erred, because she incorrectly stated that Dr. Keisler's 8% rating was the most recent assessment of Goodpaster's condition, when in fact Dr. Ballard's 5% was the more recent. The alleged error is not preserved for review, the employer having failed to raise it below. We affirm the May 15, 2002, Opinion of the Workers' Compensation Board, affirming the ALJ.

ALL CONCUR.

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