

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2002-CA-002489-WC

KATHLEEN MARY WESTERFIELD

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-93179

DIVERSIFIED HEALTH CARE, INC.; HON. JOHN
B. COLEMAN, ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

AND: NO. 2003-CA-000026-WC

DIVERSIFIED HEALTH CARE, INC.

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-93179

KATHLEEN MARY WESTERFIELD; HON. JOHN
B. COLEMAN, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

OPINION

AFFIRMING

** ** *

BEFORE: BUCKINGHAM, DYCHE, AND JOHNSON, JUDGES.

DYCHE, JUDGE: Kathleen Mary Westerfield petitions for review of a decision of the Workers' Compensation Board that reversed an Administrative Law Judge's ("ALJ") award of permanent partial disability (PPD) benefits. The Board held that the ALJ erred in awarding Westerfield PPD benefits pursuant to his interpretation and application of KRS 342.730(1)(c)1. and remanded this matter to the ALJ for entry of an order dismissing Westerfield's claim. Diversified Health Care, Inc. ("Diversified") cross-petitions, arguing that the ALJ and the Board erred by not dismissing Westerfield's claim based upon her failure to join this claim with another pending claim. We affirm the Board's decision with respect to the petition and cross-petition.

Westerfield commenced her employment with Diversified, a pharmaceutical wholesaler, in 1988 as a warehouse operator.¹ During her employment, Westerfield stocked, packed orders, lifted boxes weighing between twenty and twenty-five pounds, and worked in the receiving department. On January 18, 1999, Westerfield tripped over a tote-box containing cases of insulin and injured her back. This incident resulted in damage to her spine at L5-S1, which eventually required surgical fusion. Diversified voluntarily paid Westerfield temporary total

¹ Westerfield began working for Diversified when it was known as Mullen & Haynes. Mullen & Haynes became known as Diversified as a result of a merger with an Evansville, Indiana, warehouse in the mid 1990s.

disability (TTD) benefits from the date of the accident until her return to work in November 1999.

Westerfield first sustained a work-related injury to her lower back on October 23, 1996. Even though Westerfield returned to work, she eventually underwent surgery on her back in 1997. Westerfield remained off work until she was declared to be at maximum medical improvement in mid-1998. On September 9, 1999, while receiving TTD benefits as a result of her 1999 injury, Westerfield settled her 1996 claim with Diversified and the Special Fund for a lump sum of \$20,672.20 based upon a permanent partial disability rating of 20%. This settlement occurred with no formal application for benefits having been filed with the Department of Workers' Claims. Also, these two claims were never consolidated.

On October 25, 2000, Westerfield filed an application for resolution of injury claim alleging entitlement to benefits as a result of the January 1999 lower back injury. The matter was bifurcated on the issue of whether Westerfield was required to join the 1996 and 1999 claims pursuant to KRS 342.270(1). The ALJ determined that Westerfield was not required to join these two claims because the 1996 claim had not yet accrued for purposes of KRS 342.270(1) and that Diversified actually waived this issue because it was aware of the 1999 claim, by virtue of its voluntary TTD payments to Westerfield.

At this point, we must first address the threshold issue this employer presents in its cross-petition. In its cross-petition, Diversified argues that the Board and the ALJ erred in allowing this claim to proceed on its merits because Westerfield did not join all known causes of action as required by KRS 342.270(1). We reject this argument.

KRS 342.270(1) specifically provides as follows:

If the parties fail to reach an agreement in regard to compensation under this chapter, either party may make written application for resolution of claim. The application must be filed within two (2) years after the accident, or, in case of death, within two (2) years after the death, or within two (2) years after the cessation of voluntary payments, if any have been made. When the application is filed by the employee or during the pendency of that claim, he shall join all causes of action against the named employer which have accrued and which are known, or should reasonably be known, to him. Failure to join all accrued causes of action will result in such claims being barred under this chapter as waived by the employee.

In matters of statutory construction, we are obligated to interpret the statutory language in accordance with its common and approved usage. Claude N. Fannin Wholesale Co. v. Thacker, Ky. App., 661 S.W.2d 477 (1983). In conducting our review, however, we are mindful that the general purpose of KRS Chapter 342 is to wholly compensate injured workers whenever possible. According to the Supreme Court in Beale v. Shepherd,

Ky., 809 S.W.2d 845, 849 (1991), "[t]his principle of protecting the interests of the injured worker is a basic tenet of workers' compensation law."

KRS 342.270 clearly addresses the mandatory concurrent filing of all claims an employee has against the named employer "which have accrued." KRS 342.270(1) plainly states that during any litigation filed against an employer, the employee must include all causes of action that have accrued. In order for a claim against an employer to have accrued, this statute requires the employee to submit an Application for Resolution of Injury Claim, known as a Form 101, to the Department of Workers Claims. KRS 342.270(1); 803 KAR 25:010(3)(1)(a).

Here, the record reveals that Westerfield was receiving voluntarily paid TTD benefits from Diversified for the 1996 injury when she settled that claim in September 1999. Westerfield never formally filed a Form 101 for the 1996 injury because she was receiving voluntary TTD benefits. Moreover, Diversified was aware that Westerfield sustained another work-related back injury in January 1999. Westerfield, however, had not filed a Form 101 for that incident. Despite having knowledge of the January 1999 injury, Diversified settled the 1996 claim in September 1999. Plainly, KRS 342.270(1) and 803 KAR 25:010(3)(1)(a) mandate that a formal application for benefits must be filed for a particular claim "to have accrued."

Here, no Form 101 was filed concerning either the 1996 or January 1999 back injuries. Since the 1996 injury claim was settled prior to the filing of any formal application for benefits, that claim simply never accrued. As such, KRS 342.270(1) did not require Westerfield to disclose any potential claim for the January 1999 injury. We also believe that Westerfield's January 1999 injury failed to accrue prior to the settlement of her 1996 claim. We reach this conclusion based upon the fact that she filed a Form 101 for this injury in October 2000, approximately twenty-one months after sustaining the injury. Thus, Westerfield's application for benefits for her January 1999 injury was not, and could not have been, filed during the pendency of the 1996 claim because the 1996 claim never formally accrued as required by KRS 342.270(1). Hence, we conclude that the Board and the ALJ correctly interpreted KRS 342.270(1) in this matter before us and properly reached the merits of Westerfield's claim.

The medical evidence before the ALJ came from Dr. William Madauss and Dr. Bart Goldman. Dr. Madauss, a neurosurgeon, treated Westerfield in 1995 when Westerfield first experienced lower back pain as a result of a non-work-related injury. Dr. Madauss diagnosed a huge disc herniation at L5-S1 and performed a micro discectomy at L5-S1 and a foraminotomy at

S1 on January 10, 1996. After this surgical procedure, Westerfield felt no leg pain.

Dr. Madauss testified that he treated Westerfield in November 1996 for a work-related injury. According to Dr. Madauss, Westerfield experienced a pop in her back and left-sided leg pain while stooping. An MRI revealed a herniated nucleus pulposus at L4-5. Dr. Madauss allowed Westerfield to continue working based upon her statements that the pain was not very severe. In January 1997, Westerfield complained of increased pain. A second discectomy was performed at L4-5 in October 1997. Following this surgery, Westerfield had a slow recovery. On May 5, 1998, Dr. Madauss determined that she attained maximum medical improvement and released her to return to work with a lifting restriction of forty pounds.

On January 27, 1999, Dr. Madauss examined Westerfield after she tripped over a box and experienced back pain, right hip swelling and radiation down her right leg. During his examination, Dr. Madauss diagnosed a recurrent disc herniation at L5-S1 on the right with a free fragment. Dr. Madauss eventually performed a lumbar fusion at L4-5 through L5-S1. Westerfield returned to work on November 19, 1999 with a twenty-five pound lifting restriction.

At his deposition, Dr. Madauss assessed Westerfield a 21% whole body impairment for the 1996 injury based upon the

American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Following her 1999 injury, Dr. Madauss stated that, under the Fifth Edition of the Guides, Westerfield continued to have no more than a 21% whole body impairment. Dr. Madauss also indicated that Westerfield would have received a 21% impairment rating for these injuries under both the Fourth and Fifth Editions of the AMA Guides. Even though the Guides show no increased impairment, Dr. Madauss testified that the impairment rating mandated by the Guides is misleading because Westerfield's whole body impairment has worsened since 1999.

On July 9, 2001, Dr. Goldman performed an independent medical examination of Westerfield. During his examination, Dr. Goldman found Westerfield to have a reasonable range of motion and noted that she was working for Diversified on a regular duty status. Because of her multiple back injuries, Dr. Goldman opined that Westerfield's impairment should be determined by using the Range of Motion Model of the AMA Guides. Accordingly, Dr. Goldman assessed a 10% impairment rating to Westerfield for the 1995 injury and a 21% impairment for the 1996 injury. However, for the 1999 injury and surgery, Dr. Goldman assessed a 20% impairment. Overall, Dr. Goldman believed Westerfield's condition had improved slightly since 1996.

On May 20, 2002, the ALJ rendered his opinion and award. In his opinion, the ALJ determined that, based largely upon Dr. Madauss's testimony, Westerfield's impairment rating had not increased beyond 21% as a result of the January 1999 injury. Nevertheless, the ALJ concluded that the events of January 1999 caused Westerfield to lose her physical capacity to return to the type of work she had performed for Diversified at the time of the injury. Consequently, the ALJ elected to apply the 1.5 modifier pursuant to KRS 342.730(1)(c)1. to her 21% impairment rating, as well as the .5 modifier allowed under KRS 342.730(1)(c)2. The Workers' Compensation Board affirmed the ALJ's decision concerning the joinder of claims issue, but reversed and remanded the ALJ's decision awarding Westerfield PPD benefits. Westerfield's petition followed.

The Kentucky Supreme Court has clearly defined our function in reviewing matters from the Workers' Compensation Board. In Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992), the Court stated:

The function of further review of the WCB in the Court of Appeals is to correct the Board only where the the [sic] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing evidence so flagrant as to cause great injustice.

A claimant in a workers' compensation action bears the burden of proving every essential element of his cause of

action. Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979).

Since Westerfield was successful before the ALJ, the question on appeal is whether substantial evidence supports the ALJ's conclusion. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). Substantial evidence is evidence which, when taken alone or in light of all the evidence, has probative value to induce conviction in the mind of a reasonable person. Bowling v. Natural Resources and Environmental Protection Cabinet, Ky. App., 891 S.W.2d 406, 409 (1994), citing Kentucky State Racing Comm'n v. Fuller, Ky., 481 S.W.2d 298, 308 (1972).

As the finder of fact, the ALJ has the sole authority to assess and to evaluate the quality, character, and substance of the evidence. Square D Co. v. Tipton, Ky., 862 S.W.2d 308 (1993). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Halls Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327 (2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, Ky., 998 S.W.2d 479, 482 (1999). To reverse the ALJ's decision, it must be shown that no substantial evidence supports that decision. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). Guided by these principles, we now address the merits of Westerfield's petition for review.

Westerfield argues that the Board erroneously reversed and remanded her award of PPD benefits. We disagree.

According to KRS Chapter 342, a partially disabling condition is not compensable unless it results in a permanent impairment rating under the AMA Guides. "Permanent partial disability" is defined as a condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work. KRS 342.0011(11)(b). A "permanent disability rating" under the workers' compensation act is the permanent impairment rating selected by an arbitrator or ALJ times the factor set forth in the table appearing in KRS 342.730(1)(b). Finally, KRS 342.0011(35) defines "permanent impairment rating" as the percentage of whole body impairment caused by the injury or occupational disease as determined by the latest available edition of the AMA Guides. Thus, under Kentucky law, it appears that permanent partial disability is solely a function of impairment ratings under the AMA Guides. Accordingly, the ALJ is required to determine whether a partially disabled worker has any measurable impairment under the AMA Guides prior to the subject injury. If the ALJ so finds, the definitions listed above require a finding of a non-compensable pre-existing active disability.

Kentucky's workers' compensation law allows the ALJ to modify the amount of PPD payments payable to a worker for a particular injury. KRS 342.730(1)(c)1. and 2. provide:

1. If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be one and one-half (1- 1/2) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments.

2. If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability otherwise payable under paragraph (b) of this subsection shall be reduced by one-half (1/2) for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be restored to the rate prescribed in paragraph (b) of this subsection.

KRS 342.730(1)(c)1. requires the 1.5 modifier be multiplied by the calculation of permanent partial disability ratings "caused by the injury," as determined by KRS 342.730(1)(b). KRS 342.730(1)(c)1. and 2. only modify the amount of the award and do not affect the disability rating determined by the ALJ. However, these provisions, when read in conjunction with the definitions of "permanent partial

disability," "permanent disability rating" and "permanent impairment rating," require that a disability rating must exist before an injury can be found to have caused a compensable permanent disability. It is clear to us that the specific injury at issue must have produced some degree of impairment pursuant to the AMA Guides before an ALJ can modify a partial disability award pursuant to KRS 342.730(1)(c).

In this matter before us, the ALJ found that Westerfield's 1999 back injury and subsequent fusion did not independently produce an additional impairment rating beyond the pre-existing 21% that resulted from her 1995 and 1996 injuries. According to the testimony of Dr. Goldman and Dr. Madauss, this result occurs regardless of whether the Fourth or Fifth Edition of the AMA Guides is used. Based upon the record before us, we believe Westerfield's 1999 work-related back injury produced no independent impairment rating pursuant to the AMA Guides. Consequently, if no independent disability rating exists, there exists no award of PPD benefits for the ALJ to modify. While we sympathize with Westerfield's predicament, Kentucky's Workers' Compensation Act fails to afford her any relief. Since the ALJ abused his discretion in applying KRS 342.730(1)(c)1. and 2. to the facts before us, we must affirm the Board's opinion.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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