

**Commonwealth Of Kentucky  
Court of Appeals**

NO. 2003-CA-000017-WC

NORTH AMERICAN REFRACTORIES, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-00-64883

CANDACE STONE AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

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BEFORE: BAKER, GUIDUGLI AND PAISLEY, JUDGES.

GUIDUGLI, JUDGE. North American Refractories, Inc. ("North American") appeals from an opinion of the Workers' Compensation Board ("the Board") which affirmed the decision of the Administrative Law Judge ("ALJ"). The ALJ found that Candace Stone ("Stone") sustained a work-related injury based on objective medical findings, and ruled that she had a 13% functional impairment and was permanently partially disabled. We affirm the opinion of the Board.

North American raises two claims of error, to wit, whether the award below was supported by objective medical evidence, and whether the ALJ properly implemented the triple multiplier set forth in KRS 342.730(1)(c)(1). We have closely studied the record, the law, and the arguments of counsel, and must concluded that we cannot improve upon the well-written opinion of the Board. Accordingly, we adopt the Board's opinion as that of this Court. The Board stated in relevant part as follows:

Stone began working for North American in July of 1985. Prior to that time, she had worked in a convalescent home as an aide and also as a maintenance worker in a nursing home. Her job at North American required her to lift and perform other laboring activities associated with this brick manufacturing company. On October 20, 2000, Stone was reloading plaster and, while lifting approximately 100 pounds of material from the floor, she experienced low back pain with numbness and tingling into her legs. She felt immediate pain and with this activity but her condition worsened in the following days. Stone testified she was off work from October 20, 2000 to May 2002. She has seen a variety of physicians and has been told she has low back problems but surgery has not been recommended. Eventually, Stone was able to return to work in the mold shop with restrictions of no lifting greater than 40 pounds. Stone indicated her co-workers have helped her significantly because of her restrictions and that while she engages in some of the job activities she was doing at the time of her injury she has modified how she does those things because of her back pain and pain into the left hip and leg. She

testified she continues to experience stiffness, pain and has difficulty lifting or walking long distances.

During her testimony Stone stated she had previous torn muscles in her shoulder and upper back, initially denying she had ever sustained an injury to her low back. However, upon being confronted with certain medical evidence, Stone acknowledged she had low back problems for which she had received minor treatment, primarily in the nature of chiropractic manipulation, but on each occasion she was able to recover with physical therapy and her problems were much more significant after this injury.

Medical evidence included records from Our Lady of Bellefonte Hospital, Scott Orthopedic Center, South Shore Physical Therapy, Drs. Bal Bansal, Phillip Tibbs and Bart Goldman. The medical records referred to establish that as early as 1992 Stone was seen and treated for low back problems, including neurogenic pain in the lumbar spine. She received medication, chiropractic manipulation and physical therapy. It was noted Stone had evidence of early degenerative changes in the lumbar spine. The records also establish musculoskeletal problems in the upper back, neck and shoulders.

Dr. Bansal offered evidence by way of report and deposition. He was of the opinion Stone had a disc herniation in the lumbar spine with some nerve root involvement. He assigned a 13% impairment also noting that as a result of this condition there was an additional 10% as a result of "depression". He acknowledged the radiologist who reviewed the MRI did not find interpret (sic) the MRI as showing nerve root impingement and surgery had not been recommended. However, Dr. Bansal also stated that he personally read the MRI and found evidence of a small disc herniation

with nerve root entrapment at the S1 level on the left. Stone was also diagnosed with lumbar facet syndrome and bilateral sacroilitis. Dr. Bansal's examinations revealed not only what he considered to be a herniated disc but also showed muscle spasm in the lumbar spine as well as certain consistencies on clinical exam.

Dr. Tibbs saw Stone on referral from Dr. Bansal in February 2001. Dr. Tibbs reviewed a CT scan and post-CT myelogram which, in his opinion, showed no nerve root compression. He did not recommend surgery and diagnosed facet disease with a recommendation for facet blocks and work hardening.

Dr. Goldman examined Stone in July 2001 and reviewed a number of medical records and specialized studies, including a CT myelogram and MRI. He concluded Stone's tenderness on exam was inconsistent and the range of motion limitation was voluntary. He believed she had symptom exaggeration. Dr. Goldman did not find evidence of muscle spasm, atrophy or sensory deficiency. He was of the opinion Stone would approximately fall within a DRE category 1 with a 0 impairment. He believed she was at a maximum medical improvement and with work hardening she would be able to return to work without permanent restrictions.

The ALJ acknowledged Stone returned to work with North American earning more than she did at the time of the injury. However, he also believed the more credible testimony came from Dr. Bansal as it related to Stone's physiological impairment but declined to find she had impairment as a result of her "depression". The ALJ also found Dr. Bansal credible as it related to restrictions and as a result believed Stone "cannot perform the work activities which she did in the past and she feels that she

certainly could not sustain that type of activity in the future."

North American's first challenge to the ALJ's decision addresses itself to the question of objective medical findings to support a harmful change in the human organism. In doing so, North American relies heavily upon Gibbs vs. Premiere Scale Co., Ky., 50 SW3d 754 (2001). Gibbs, of course, was the initial decision addressing what constituted objective medical findings, but this issue has been further developed in Staples vs. Konvelski, Ky., 56 SW3d 412 (2001) and Ryan's Family Steak House vs. Thomason, Ky., 83 SW3d 89 (2002). In the latter two cases it became clear the language used by the Legislature was intended to be inclusive of standardized physical and psychological examinations performed by physicians and the use of acceptable diagnoses by physicians. North American relied heavily upon its belief that Dr. Bansal was erroneous and incorrect in his interpretation of the MRI and in finding the existence of a herniated disc. Initially, we would state that Dr. Bansal made it clear that in reaching this conclusion he personally reviewed the specialized studies and reached his opinion based upon his own review and did not rely up (sic) the interpretation of these studies by other physicians. At most, we have a disagreement of interpretation of specialized studies performed by physicians. With such a disagreement, the ALJ was simply faced with a conflict in the evidence between qualified physicians and it is the ALJ who has the authority to pick and choose from that evidence to determine what he believes to be the more credible evidence. Codell Construction Co. vs. Dixon, Ky., 478 SW2d 703 (1972) and Smyzer vs. B. F. Goodrich Chemical Co., Ky., 474 SW2d 367 (1971). Therefore, whether relying upon Gibbs, Staples or Thomason, there was substantial evidence of probative value upon

which the ALJ could conclude the existence of objective medical evidence.

However, even if we were to believe there were no herniated discs or if the ALJ were to reach that conclusion, this would not necessitate reaching the conclusion of no objective medical evidence. Specialized testing, such as MRI, CT scan or myelogram, is not a requirement to support a finding of objective medical evidence. The existence of muscle spasm, as found by Dr. Bansal, would be sufficient to meet this requirement in KRS 342.0011(1). Further, both Dr. Bansal and Dr. Tibbs found evidence of facet syndrome through the specialized testing. Finally, Dr. Bansal concluded the clinical examination supported by his ultimate diagnosis. A clinical exam is a well-accepted medical practice and, as such, meets the requirement of objective medical evidence. Although Dr. Goldman disagreed significantly with Dr. Bansal's testimony and conclusions, there is nothing in the evidence that would require the ALJ to follow Dr. Goldman's opinions. Ultimately, the ALJ was faced with a simple disagreement in the evidence between physicians and while there was evidence to support the position of North American, there is also evidence to support the position of Stone. In those circumstances, whether we would agree or disagree with the ALJ, is irrelevant. McCloud vs. Beth-Elkhorn Corp., Ky., 514 SW2d 46 (1974).

North American also makes numerous references to what it believes would be evidence establishing Stone lacked credibility since she initially denied any prior low back problems. We acknowledge there are inconsistencies in her testimony, which could have led to an ALJ finding she lacked credibility. However, the ALJ is in the unique position of not only reviewing the initial evidence but also observing the testimony of the injured party. Credibility

of witnesses is a unique factual finding and such factual findings rest with the ALJ and not the Workers' Compensation Board or any other appellate body. KRS 342.285 and Smyzer, supra.

North American challenges the ALJ's assessment of the 3 multiplier since Stone has returned to work at the same or greater wage and is in the same job classification. North American does acknowledge this Board's previous decisions in Kentucky River Enterprises, Inc., vs. Elkins, Claim No. 00-67419, Opinion rendered November 28, 2001, in which we held the 3 multiplier could be used even if the individual returns to work at the same or greater wage. North American attempts to distinguish this and another case. The problem with which this Board is faced, however, is that with the change in the Workers' Compensation Act and the use of the multipliers of 3, 2 and 1 beginning on July 14, 2000, these various sections of KRS 342.730(1)(c) are mutually exclusive of one another. At the same time of the decision in Ball vs. Big Elk Creek Coal Co., Inc., Ky., 25 SW3d 115 (2000), both the enhancer and the reducer could be used. In cases decided between December 12, 1996 and July 14, 2000, this Board, as well as the courts, acknowledged that the subsections of .730(1)(c) required a differing analysis. One applied to physical capacity, the other simply addressed itself to actual earnings. While this Board would agree with the overall intent of the Workers' Compensation Act might be better served were a middle ground available when an individual lacks the physical capacity to return to the same job but does, in fact, return to work at the same or greater wage, unfortunately we do not believe the present version of the Act permits us to find such a middle ground. It is not unreasonable, in our opinion, and certainly within Legislative authority, to permit an individual who returns to work at the same or greater wage but who, in

reality, lacks the physical capacity to perform the same work they were doing at the time of injury to have enhanced occupational disability benefits. Beginning in December 1996, permanent partial disability ceased to be a function of actual occupational disability and instead became a mathematical function of the AMA impairment rating. However, the Legislature, in attempting to consider the reality of actual occupational disability, also provided a method by which the impairment rating and the factors to be applied to that impairment rating could be enhanced if there were an actual greater occupational disability because of lack of physical capacity.

Having concluded that the Board properly considered and disposed of North American's claims of error, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

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