

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2003-CA-000040-WC

FRANCES E. GOLUBIC

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-60720

ALLIED SYSTEMS;
HON. LLOYD R. EDENS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER, GUIDUGLI AND PAISLEY, JUDGES.

GUIDUGLI, JUDGE. Frances E. Golubic has petitioned this Court for review of the December 11, 2002, opinion of the Workers' Compensation Board, which affirmed in part, reversed in part and remanded the July 31, 2002, opinion, order and award of the Administrative Law Judge. We affirm.

In Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992), the Supreme Court addressed its role and that of the Court of Appeals in reviewing decisions in workers' compensation

actions. "The function of further review of the WCB in the Court of Appeals is to correct the Board only where the [] Court perceives 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." Id., at 687-88. We have reviewed the parties' briefs as well as the record, and have determined that the Board did not commit any error or misconstrue controlling statutes or precedent. As we cannot improve upon Board Member Gardner's excellent opinion, we shall adopt it as our own:

Frances E. Golubic ("Golubic") appeals and Allied Systems, Ltd. ("Allied") cross-appeals from a decision of Hon. Lloyd R. Edens, Administrative Law Judge ("ALJ"), awarding Golubic permanent partial disability benefits and temporary total disability ("TTD") benefits for a work-related low back injury. On appeal, Golubic contends the ALJ abused his discretion by relying on medical opinions that were incomplete, while Allied argues it is entitled to a credit for overpayment of TTD.

Golubic filed an Application for Resolution of Injury Claim on May 10, 2001, alleging an October 13, 1999 injury to her back, which occurred while off-loading vehicles from a car carrier. The issues on appeal, the extent of Golubic's impairment and the date she attained maximum medical improvement ("MMI"), are medical determinations requiring a primary focus on the medical evidence of record.

Shortly after the accident, Golubic was referred to Dr. Ellen M. Ballard for an initial evaluation, performed on November

11, 1999. Dr. Ballard's impression was lumbar strain and she recommended two and a half weeks of physical therapy. In a December 2, 1999 reevaluation, Dr. Ballard instituted a work hardening program to improve Golubic's condition before returning to regular duty work. However, on December 8, 1999, Golubic presented with persistent symptoms, prompting Dr. Ballard to order an MRI. Diagnostic testing revealed "anterolisthesis of L4 on L5 by about 5 to 6mm has diffuse disc bulging." On December 30, 1999, Dr. Ballard recommended daily walking and anticipated release to regular duty on January 17, 2000. Golubic complained of continued pain and Dr. Ballard recommended evaluation by a neurosurgeon.

Dr. Jonathan E. Hodes examined Golubic on January 31, 2000. Golubic presented with complaints of low back pain, right hip and right buttock pain, with intermittent pain that extends to the mid-thigh. Dr. Hodes noted the MRI demonstrated a mild anterolisthesis of L4 on L5 and he diagnosed lumbar strain and degenerative disc disease of the lumbar spine.

Golubic returned to Dr. Ballard on March 8, 2000. She stated physical therapy and work hardening had produced no positive results. Dr. Ballard recommended no repetitive bending, stooping, sitting or standing and referred Golubic to "Functional Recovery Program" for evaluation.¹ Allied's carrier denied payment and apparently the evaluation was never performed. Golubic did not return to Dr. Ballard for follow up.

Dr. Martyn Goldman performed an independent medical examination on March 23, 2000, at the request of Golubic's counsel. Golubic presented with right-sided low back pain and occasional numbness in the right lateral thigh. Dr. Goldman received an

¹ We are not sure whether this referral from Dr. Ballard is for a functional capacity evaluation or for pain management.

appropriate history, performed a physical examination and reviewed diagnostic studies, including the 1999 MRI. Dr. Goldman diagnosed degenerative disc disease of the lumbar spine with spondylolisthesis at L4-5 and a superimposed lumbosacral strain. Dr. Goldman noted that there had been little change in Golubic's condition in the past six months, and therefore determined, "she is probably at maximum medical improvement." Dr. Goldman stated that given Golubic's underlying preexisting disc disease, it was unlikely that she would ever be able to return to her pre-injury employment but she could certainly return to less physically demanding work. Dr. Goldman placed Golubic in the DRE Category II and assessed a 5% permanent partial whole body impairment, attributing 50% of that amount to preexisting degenerative disc disease.

Dr. Tinsley Stewart evaluated Golubic for purposes of an independent medical evaluation on September 25, 2001. Dr. Stewart had the benefit of the medical reports of Drs. Ballard and Hodes, as well as the 1999 MRI. Dr. Stewart was of the opinion, based on mild radicular involvement, that Golubic fell within DRE Category III and assigned a 10% whole person functional impairment rating. Dr. Stewart did not believe Golubic was a surgical candidate and recommended loss of weight, quit smoking and continue an exercise program. In a supplemental letter report dated May 15, 2002, Dr. Stewart, at Golubic's request, reviewed the December 23, 1999 MRI report noting anterolisthesis of L4 on L5 by about 5-6 mm. Dr. Stewart revised his original functional impairment assessment, now opining that Golubic should be more properly placed in Category IV, since there was 4.5 mm or more translation of one vertebra on another, and assessed a 20% functional impairment rating.

Dr. Gregory E. Gleis performed an independent medical examination on November 21, 2001. At that time, Golubic presented with complaints of low back, right leg pain and some left leg pain. Dr. Gleis had the benefit of the 1999 MRI, as well as the medical reports of Drs. Ballard, Hodes and Goldman. Dr. Gleis diagnosed lumbar strain; preexisting degenerative spondylolisthesis at L4-L5, with disc bulging at that level; as well as central stenosis and bilateral recessed stenosis including L5-S1 paracentral bilateral disc herniation. Dr. Gleis found no evidence of radiculopathy and pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment (Guides), Fourth Edition, assigned a 5% functional impairment rating, of which he attributed one-half to preexisting degenerative spondylolisthesis. Dr. Gleis believed Golubic could not return to her prior employment, but believed she would be able to function at a light duty position. Addressing MMI, Dr. Gleis stated "[s]he is at maximum medical improvement. I would agree with Dr. Goldman's assessment of being at maximum medical improvement."

In a supplemental report dated June 3, 2002, Dr. Gleis specifically addressed Dr. Stewart's 20% functional impairment rating. Dr. Gleis was critical of that assessment, stating loss of motion segment integrity is defined by the Guides as 'anteroposterior motion of one vertebra over another that is greater than . . . 4.5mm in the lumbar spine.' Dr. Gleis noted that loss of motion segment integrity cannot be diagnosed on the single image produced by an MRI. He stated that to determine whether motion is occurring, or if this is a static deformity that would not be entitled to an additional impairment, is to have lumbar flexion and extension x-rays performed. Dr. Gleis reiterated that Golubic's "spondylolisthesis is a degenerative spondylolisthesis which is a part of the natural aging process and is

not a traumatic injury." He further concluded "whatever impairment Golubic may receive for the degenerative spondylolisthesis would not be 'injury related'."

Apparently, based on the nudging from Dr. Gleis's supplemental report, lateral flexion extension films were obtained. In a June 30, 2002 second supplemental report, Dr. Stewart concluded Golubic had considerable arthrolisthesis from 4 mm in extension to 7 mm on the flexion view. Dr. Stewart now assessed a 23% whole person impairment, adding an additional 3% based on Golubic's persistent symptoms.

After a thorough review of the lay and medical testimony of record, the ALJ concluded:

The two issues for determination are extent and duration and temporary total disability benefits. Dr. Gleis and Dr. Goldman have assigned 5% functional impairment ratings for a DRE Category II, while Dr. Stewart was of the opinion the Plaintiff suffered a 23% functional impairment under a DRE Category IV due to loss of motion segment integrity. Dr. Hodes, a neurosurgeon to whom the Plaintiff was referred by Dr. Ballard for evaluation, diagnosed the Plaintiff's condition as lumbar strain and degenerative disc disease. Both Dr. Goldman and Dr. Gleis were of the opinion the Plaintiff's condition should be placed under a DRE Category II. In light of the diagnosis by Dr. Hodes and the opinion of both orthopedic surgeons, I am of the opinion that Plaintiff has suffered a 5% functional

impairment rating associated with a DRE Category II.

Addressing MMI, the ALJ stated "Dr. Gleis examined the Plaintiff on November 21, 2001 and was of the opinion she had reached maximum medical improvement at that time. Therefore, I find the Plaintiff was temporarily totally disabled from the date of her injury until the date of her examination by Dr. Gleis. Thereafter, she shall be entitled to the permanent partial disability awarded herein."

In her direct appeal, Golubic argues that Drs. Goldman and Gleis ignored or missed the diagnosis of anterolisthesis as demonstrated on the MRI and consequently did not order or review flexion or extension films, rendering their impairment ratings based on an incomplete examination. Golubic believes the ALJ abused his discretion by not relying on the reports and opinions of Dr. Stewart.

Since Golubic, the party with the burden of proof and risk of persuasion, was unsuccessful before the ALJ, the sole issue on appeal is whether the evidence is so overwhelming upon consideration of the record as a whole as to compel a finding in her favor. Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735 (1984). If the findings of the ALJ are supported by substantial evidence, this Board is obligated to affirm. KRS 342.285(1) and (2). Furthermore, the ALJ, as fact finder, has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Thus, where the evidence is conflicting, the ALJ is at liberty to pick and choose whom and what to believe and the ability of the non-prevailing party to point to alternative evidence is largely irrelevant. Brockway v. Rockwell

International, Ky.App., 907 S.W.2d 166 (1995).

Here, there is evidence of widely divergent impairment ratings assessed by Drs. Gleis and Goldman on the one hand and Dr. Stewart on the other. While Dr. Stewart addressed the alteration of motion segment integrity, the other physicians did not. Recently, the Kentucky Court of Appeals, in FAB Steel v. Meyers, 2001-CA-001564-WC (Rendered February 15, 2002 and designated not to be published), addressed the appropriate manner for impeaching a doctor's methods in reference to the Guides. While we are aware that an unpublished case should not, under most circumstances, constitute primary authority, the Court in FAB Steel adopted the opinion of the Board - an opinion we continue to hold. FAB Steel stands for the proposition that evidence of an impairment rating represents the calculations and opinion of an expert. Contrary expert opinions and/or skillful and vigorous cross-examination remain the practitioner's tool to overcome unfavorable expert opinions. Nevertheless, differing expert opinions as to impairment ratings remain nothing more than conflicting evidence. [Golubic] can prevail on appeal only if [she] can demonstrate that Drs. Gleis, Goldman and Hodes' opinions are so lacking in probative value as to be untrustworthy as a matter of law.

All of the examining and treating physicians had the benefit of the 1999 MRI identifying the listhesis. Furthermore, there is nothing contained within the record directly impeaching either Dr. Gleis's or Dr. Goldman's methodology. The ALJ was free to reject the testimony of Dr. Stewart, without further explanation, on an issue that is inarguably purely a medical question. While the ALJ would have been authorized to adopt Dr. Stewart's opinion, he was not so mandated. The ALJ has

appropriately summarized the proof, analyzed the facts and rendered conclusions of law based on substantial evidence and we are without authority to disturb this portion of the award.

In its cross-appeal, Allied argues it has overpaid TTD benefits and is entitled to additional credit. Allied made voluntary payments of TTD from the date of injury through November 21, 2000. The ALJ, however, awarded TTD benefits through November 21, 2001, the date of Dr. Gleis's first report.^[2]

"Temporary total disability" means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment. KRS 342.0011(11)(a); Central Kentucky Steel v. Wise, Ky., 19 S.W.3d 657 (2000); Hall's Hardwood Floor Co. v. Stapleton, Ky.App., 16 S.W.3d 327 (2000).

The ALJ, in his findings of fact and without elaboration, relied on the statement contained in Dr. Gleis's November 21, 2001 report that "Golubic is at maximum medical improvement." Allied argues Dr. Gleis, in that report, specifically agreed with Dr. Goldman's assessment of being at MMI on March 23, 2000. Golubic, on the other hand, relying on Central Kentucky Steel v. Wise, supra, argues it would not be reasonable to terminate her TTD benefits when she was released to perform minimal work, but not

² The ALJ stated in the Findings of Fact and Conclusions of Law section of his opinion, order and award that Golubic "was temporarily totally disabled from the date of her injury until the date of her examination by Dr. Gleis." Dr. Gleis examined Golubic on November 21, 2001. However, the ALJ only awarded TTD benefits from October 14, 1999, until November 21, 2000. We further note that Allied terminated the payment of its voluntary benefits on November 21, 2000. Although the opinion is inconsistent in this regard, the issue is moot because we are affirming the Board's decision to hold that Golubic reached MMI on March 23, 2000, thus ending her entitlement to TTD benefits on that date, and to reverse the ALJ's award of TTD benefits and remand for correction.

the type of work that was customary or that she was performing at the time of her injury.

Again, the ALJ's finding on this issue is conclusive if supported by substantial evidence of probative value. Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971). Unfortunately for Golubic, we believe the ALJ has misinterpreted Dr. Gleis's statement regarding MMI. His reliance on Dr. Gleis's statement "she is at maximum medical improvement" to arrive at the conclusion that Golubic "reached maximum medical improvement at that time" is out of context and renders the remainder of the doctor's opinion meaningless. Both physicians unequivocally announced that Golubic could return to light duty work, but neither felt that she could return to her prior employment. Contrary to [Golubic's] argument, Golubic was never engaged in any active medical treatment after her last visit to Dr. Ballard in early March 2000. This is substantiated by not only the medical reports, but also by Golubic's own testimony.

While it is true that Dr. Ballard recommended a "Functional Recovery Program" evaluation, the fact that payment for this treatment was denied, standing alone, does not control the date of maximum medical improvement. We have scoured the reports of both Drs. Gleis and Goldman, as well as the testimony of Golubic, for evidence of medical treatment or any indication of an improvement or deterioration of her condition since March 23, 2000 and have found none. Further, as pointed out by Golubic, the Guides define MMI as "a condition or state that is well stabilized and unlikely to change substantially in the next year with or without medical treatment". Over time there may be some change; however, further recovery or deterioration is not

anticipated." Guides, Fifth Edition, Glossary, p. 601. (Emphasis added.)

It was Dr. Goldman's opinion that MMI was reached as of March 23, 2000, and Dr. Gleis's opinion was in accord with that assessment. Neither doctor attributed any significance to the failure to complete a functional recovery program/pain management nor did they recommend further treatment designed to improve Golubic's condition. We can ascribe no reasonable interpretation to Dr. Gleis's statements regarding maximum medical improvement, other than Golubic had attained that status on March 23, 2000. This is especially true since Dr. Goldman believed Golubic's condition had been static for six months before that date. The evidence compels a finding that the recovery process was complete at the time of Dr. Goldman's evaluation. In summary, we believe Dr. Goldman's assessment of MMI and Dr. Gleis's agreement with that assessment provides conclusive support for the only reasonable finding - that Golubic attained maximum medical improvement on March 23, 2000.

For the foregoing reasons, the opinion and award of the ALJ is AFFIRMED on the issue of the extent of Golubic's permanent partial disability and REVERSED on the issue of TTD and REMANDED for entry of a corrected award in conformity with the views expressed in this opinion.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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