

RENDERED: October 3, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2003-CA-000128-WC

ANTHONY HURLEY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-704494

HUSKY COAL COMPANY; HON. RICHARD M.
JOINER, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** *

BEFORE: BAKER, GUIDUGLI AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is an appeal from a December 18, 2002, opinion of the Workers' Compensation Board vacating an opinion and award entered by an Administrative Law Judge (ALJ). For the reasons stated hereafter, we affirm.

On August 15, 2001, Anthony Hurley filed a workers' compensation claim regarding an injury which he suffered on September 6, 2000 while working for Husky Coal Company. Hurley asserted that while he was loading rock dust into a scoop bucket, he immediately began to experience low back pain and

numbness in his legs. He finished his shift even though he could not stand upright and was in pain, but he did not return to work after that date. Shortly thereafter, Hurley began receiving treatment from Dr. Harry Lockstadt.

Husky contends, however, that a percentage of Hurley's impairment is attributable to a 1999 injury which occurred when a rock fell and struck Hurley in the back while he was loading bags of rock dust. Hurley variously stated that this incident occurred in March or in October 1999, but the record suggests that it occurred in March of that year. Regardless, Hurley testified that he continued to work after the 1999 incident despite significant bruising, but that he experienced pain in his lower back and legs approximately two weeks later while he was loading rock dust. Hurley then was absent from work for approximately eight weeks, during which time he received temporary total disability (TTD) benefits. Hurley thereafter returned to work but continued to take medication and to receive treatment from a chiropractor, Dr. Stephen Harrison.

The ALJ subsequently concluded that Hurley sustained a work-related injury on September 6, 2000, that he was temporarily totally disabled from that date until April 21, 2001, and that he had a permanent disability rating of 7.65% (9% multiplied by 0.85). See KRS 342.730. Hurley was awarded TTD benefits of \$298.97 per week from the date of the injury to

April 21, 2001, and permanent partial disability benefits of \$68.61 per week for 425 weeks thereafter. Regarding the issue of permanent preexisting active impairment, the ALJ stated:

The employer contends that a substantial portion of the current impairment is related to a 1999 incident. The only record from a medical facility prior to September 6, 2000 that has been made a part of the record is the April 8, 1999 record of Dr. Ahmed. Dr. Ahmed identifies two impressions. First is lumbosacral strain with paraspinal muscle spasm and tenderness. Second is to rule out traumatic disc herniation. This record, standing alone, does not identify a permanent impairment. Dr. Lockstadt's deposition was taken and at the deposition he was presented with some records. The records themselves were never offered into evidence. They appear to be records from a chiropractor, Dr. Harrison, with a treatment dated as recent as June 23, 2000. From those records, Dr. Lockstadt concludes that there was ongoing lower back pain with intermittent leg pain. No imaging studies are referenced prior to September 6, 2000. Dr. Lockstadt's testimony might be viewed as indicating a 5 to 8 percent impairment existing before September 6, 2000.

I am not satisfied that there is a permanent impairment that existed prior to September 6, 2000. I am unable to find any records indicating that Mr. Hurley had a permanent condition prior to September 6, 2000. The records of Dr. Ahmed indicate a temporary condition. The fact that there were a few visits to a chiropractor where similar complaints were made does not add very much. KRS 342.0011(1) defines "injury" as "any work-related traumatic event or series of traumatic events," It appears that Mr. Hurley has been subjected to a series of traumatic events with the last occurring on September 6, 2000. I

think it is fair to say that although Mr. Hurley had pre-existing condition [sic] in his lumbar spine, it had not been rated as producing an impairment prior to September 6, 2000. The pre-existing condition, along with the substantial effects of the September 6, 2000 incident, now produce a permanent impairment.

On appeal to the board, Husky argued that the ALJ erred by failing to apportion a part of Hurley's disability to a permanent preexisting active impairment resulting from the 1999 injury. The board vacated and remanded the ALJ's opinion and award for more specific findings as to the percentage of Hurley's disability which is attributable to the 1999 injury. This petition for review followed.

Our review of the board's review of the ALJ's decision is limited to a determination of whether the board overlooked or misconstrued the applicable law, or whether it so flagrantly erred in assessing the evidence as to cause gross injustice. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992); Daniel v. Armco Steel Company L.P., Ky. App., 913 S.W.2d 797, 798 (1995). If an ALJ has found in favor of a claimant who had the burden of proof, the question on review is whether the ALJ's findings were supported by substantial evidence, which is defined as "evidence which would permit a fact-finder to reasonably find as it did." Special Fund v. Francis, Ky., 708

S.W.2d 641, 643 (1986). See also Wolf Creek Collieries v. Crum, Ky., 673 S.W.2d 735 (1984).

Here, our review of the record shows that substantial evidence did not support the ALJ's findings regarding Hurley's preexisting active impairment. The record shows that after reviewing Dr. Harrison's notes, Dr. Lockstadt testified that Hurley experienced continuous back pain after his 1999 injury and that the pain increased after September 6, 2000. Based on the DRE Category II, Dr. Lockstadt was of the opinion that Hurley suffered a whole body impairment of five to eight percent before September 6, 2000. Similarly, based on the range of motion model, Dr. Cornett was of the opinion that Hurley had a four percent impairment, a portion of which was attributable to the 1999 injury. Finally, Hurley himself testified that he had experienced constant pain in his back and right leg since the 1999 injury.

In support of its finding that Hurley had not suffered any permanent preexisting active impairment, the ALJ relied exclusively on the report of Dr. Ahmed, who examined Hurley after the 1999 injury and formed two impressions. First, Dr. Ahmed opined that Hurley suffered from lumbosacral strain with paraspinal spasm and tenderness, thereby suggesting that Hurley suffered only a temporary impairment. However, Dr. Ahmed also recommended that Hurley should undergo an MRI of his lower back

in order to rule out traumatic disc herniation. Dr. Ahmed therefore obviously suspected that Hurley may have suffered something more serious than a muscle strain, and at best his report was equivocal regarding the temporary nature of Hurley's 1999 injury. Thus, Dr. Ahmed's report did not refute the testimony of Dr. Lockstadt, Dr. Corbett and Hurley himself.

Given the evidence, we must conclude that substantial evidence simply did not support the ALJ's opinion regarding the nonexistence of a permanent preexisting active impairment. The board therefore did not err by vacating and remanding the ALJ's opinion for more specific findings of fact.

The board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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