

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2003-CA-000676-WC

DEBRA JONES

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-95837

BAPTIST HOSPITAL EAST; HON. RONALD E.
JOHNSON, Administrative Law Judge;
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
VACATING AND REMANDING WITH DIRECTIONS

** ** * * *

BEFORE: COMBS, JOHNSON, and MINTON, Judges.

COMBS, JUDGE. Debra Jones appeals from a decision of the Workers' Compensation Board which reversed a decision of the Administrative Law Judge (ALJ) awarding her permanent partial disability benefits of \$12.23 per week for 425 weeks. The ALJ found that while working for the appellee, Baptist Hospital East (the Hospital), Jones sustained a 5% impairment. It attributed her impairment rating to the cumulative effect of two work-related injuries to her back: one occurring in 1999 and the other in 2000. The Board concluded that the ALJ abused his

discretion in making an award "for a 1999 injury that was never pled as compensable or prosecuted." (Opinion of the Board, March 5, 2003, p.21). It also determined that there was no evidence that Jones had suffered an impairment as a result of her 2000 injury to substantiate the ALJ's award. After a review of the record, we conclude that the Board has erred both in its application of the law and in its assessment of the evidence so as "to cause gross injustice." See Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992). Thus, we vacate and remand.

Jones, a certified nurses' aide, began working for the Hospital in March 1999. While assisting another nurse lift a heavy patient into bed, she sustained an injury to her lower back on September 16, 1999. There is no dispute that she immediately reported the injury to her supervisor and that she sought medical attention. Dr. Thomas R. Lehmann, who diagnosed her condition as being primarily muscular in origin, treated her conservatively.

Jones's condition had resolved itself for the most part when four months later, on January 16, 2000, she again injured her back in a similar incident while attempting to pull a 500-pound patient back up in his bed. She sought emergency treatment and was referred to physical therapy. When her pain did not subside, Jones was referred to Dr. Warren Bilkey, who in

conjunction with Dr. Lehmann, treated her conservatively for many months. Her condition did not improve significantly despite her compliance with the doctors' treatment regimen, which included home exercises, cortisone injections, epidural blocks, a back brace, a TENS unit, and pain medication. She was ultimately referred to Dr. Steven Glassman, a surgeon, who recommended continued conservative treatment for as long as possible before resorting to surgery. Several months after the second injury, Dr. Lehmann placed permanent restrictions on Jones's physical activities, which included limited sitting, no repetitive bending or lifting, and no lifting of any weight in excess of twenty pounds.

Jones had continued to work as a nurses' aide after the first injury of September 1999. However, because of her persistent back pain and the restrictions placed on her activities, Jones could not perform the strenuous work required of a nurses' aide after the second injury. Even though she was given light clerical duties by the Hospital, she frequently missed work due to her medical condition. She was paid some temporary total disability (TTD) benefits by the Hospital. However, she was also required to use sick leave and personal vacation days when unable to work because of her back impairment. Due to her frequent absence from work resulting from her back injuries, the Hospital terminated her employment

on January 15, 2002 -- coincidentally, the same date on which Jones filed her Form 101 seeking permanent disability benefits.

Because she had been able to continue to work as a nurses' aide after the 1999 injury, Jones's application for benefits was based only on the January 2000 injury. However, the accompanying Form 105 listed Drs. Lehmann and Bilkey as having treated her for lower back problems since 1999. Additionally, the attached medical reports from Dr. Bilkey contained his opinion that although Jones's medical condition had been caused by the January 2000 incident, it was complicated by the September 1999 injury.

Before the ALJ, the Hospital stipulated that Jones had injured herself in 2000 while lifting one of its patients. Nevertheless, it contended (as it has throughout this litigation) that her impairment had been caused by the 1999 work-related incident -- an event for which no claim for benefits was filed within the two-year statute of limitations provided in KRS¹ 342.185(1). It urged that the ALJ characterize Jones's 2000 injury as a mere exacerbation of a pre-existing active impairment rather than an injury for which compensation could be awarded pursuant to KRS 342.730(1)(b).

Essentially, the parties presented the ALJ with two "all-or-nothing" theories. Jones argued that her impairment was

¹ Kentucky Revised Statutes.

wholly attributable to the January 2000 injury; the Hospital argued that her impairment arose solely from the time-barred occurrence of September 1999. Refusing to rely totally on either theory, the ALJ reasoned that Jones's impairment was attributable to both events. He also found that the statute of limitations did not preclude an award:

[Jones] was injured while lifting patients in September of 1999 and again in January of 2000. Temporary total disability benefits were paid through November of 2000. The statute of limitation was tolled on the September 16, 1999 injury by the payment of the TTD in 2000. [Jones] testified without objection from the [Hospital] about the two injury dates. The medical testimony presented by the [Hospital] showed[] the two dates. The [Hospital] wants to rely o[n] the "missed" statute of limitation claiming the January 16, 2000 injury is an exacerbation of the September 16, 2000 [sic - should be 1999] injury. The TTD paid in 2000 was for [Jones's] back condition. If the January 16, 2000 incident is an exacerbation then the TTD paid relates back to the actual[] initial injury date of September 1999. The disability (not the impairment) did not manifest until after the January injury. The impairment is used to calculate the disability. That the impairment existed because of the September 16, 1999 injury is not fatal to [Jones's] claim. The back injury was the result of both and the TTD was the result of the back condition. (Emphases added.)

(ALJ's Opinion, Order and Award, August 21, 2002, pp. 7-8.)

In its review, the Board excoriated the ALJ for his determination that the compensability of Jones's 1999 injury was

tried by implied consent. The Board harshly characterized the ALJ's reasoning as "flawed" and as reflecting his sympathy to "Jones'[s] obvious plight." In an almost *ad hominem* attack, it alluded to the ALJ's efforts as an "autonomous edict." Despite the existence of CR² 15.02 and controlling authority allowing the amendment of pleadings to conform to the evidence in the context of workers' compensation litigation, the Board nonetheless concluded that the ALJ abused his discretion in his treatment of the 1999 injury. It stated:

In this instance, it is clear from the record that Jones never offered any signal, to either Baptist or the ALJ, she believed her 1999 injury to be compensable, nor did she provide any indication that she was seeking benefits for that injury, either formally or informally, as part of her theory of her case before the ALJ. Rather, Jones'[s] efforts focused exclusively on recovery for damages resulting from the January 16, 2000 event. Any evidence relative to the 1999 injury was presented solely with regard to the defense of pre-existing active impairment. By failing to even tacitly seek recovery for the effects of the earlier traumatic event, we believe Jones, as a matter of law, waived her rights to recover benefits under the Act for that injury. While we acknowledge this is a defect that based on existing published authority, could have at any time easily been corrected by even the slightest allegation in the alternative on the part of the respondent, the matter was simply never put on trial. Accordingly, the ALJ's autonomous edict holding Jones'[s] 1999 injury to be both timely and compensable

² Kentucky Rules of Civil Procedure.

qualifies as an abuse of discretion and must be reversed.

(Board's opinion, pp. 23-24.)

The Board continued to engage in inappropriately caustic commentaries on the ALJ's ruling with respect to his holding as to the statute of limitations and the payment of TTD, attacking his reasoning as "tortuous" and as "an artistic effort" to avoid the two-year limitations period. Id. Following a recital of a series of rhetorical incivilities, the Board finally held that there was no evidence to support the ALJ's finding that Jones's impairment was causally related to the 2000 incident. Therefore, it remanded the matter to the ALJ with directions that he dismiss the claim.

Although the Board's opinion is thorough, it erred in concluding that the ALJ abused his discretion in his resolution of the claim. We believe that it also erred in observing that there is a lack of evidence to support the ALJ's finding that Jones's impairment is attributable to both injury events.

In ruling that the ALJ erred as a matter of law in treating the compensability of the 1999 injury as an issue tried by implied consent, the Board relied on an unpublished, non-final opinion of this Court. Kroger Company v. [Yvonne] Jones, 2002-CA-001655-WC, rendered December 13, 2002 (review pending), involved an award for a shoulder injury which was not pled by

the claimant. In its analysis, the Board held that the ALJ did not abuse his discretion in permitting and considering the claimant's testimony and medical evidence of a separate injury not listed on her Form 101. Relying on Collins v. Castleton Farms, Inc., Ky.App., 560 S.W.2d 830 (1977), and Nucor Corp. v. General Electric Co., Ky., 812 S.W.2d 136 (1991), the Board held that although it noted the impropriety of the admission of evidence relating to an unpled injury, the employer suffered no prejudice as a result of the ALJ's decision. The Board affirmed the ALJ's award of benefits.

This Court reversed the Board's decision and held that it erred in affirming the ALJ's application of CR 15.02. In the case before us, the Board quoted extensively from Kroger in concluding that the ALJ abused his discretion in treating the compensability of the 1999 injury as having been impliedly or implicitly tried by the parties. While acknowledging that an unpublished opinion of this Court may not be cited as authority, the Board disregarded that rule and opined that the ruling "may ultimately be relevant to this claim." (Board's opinion, p. 25.)

Regardless of the outcome of Kroger upon further review by the Kentucky Supreme Court, we disagree that it bears any potential precedential impact on the facts of this case. We assume the good faith of the Board in citing Kroger due to its

superficial similarity factually to this case. Therefore, we have elected to discuss Kroger in order to dispel any illusions as to its relevance in this matter.

The employer in Kroger specifically objected to the introduction of testimony concerning the claimant's unpled injury. However, the Hospital in this case did not raise an objection. If an opposing party does not object to the evidence when it is presented, sound authority provides that issues may be tried by implied consent in the context of workers' compensation litigation. Collins v. Castletone Farms, supra, 560 S.W.2d at 831. The Board noted that Jones has yet to move to amend her pleadings to conform to the evidence. However, pleadings tried by implicit consent may be amended at any time - - even after judgment. In discussing CR 15.02 in such a context, Justice Liebson observed as follows in Nucor, supra, at 145:

Our Civil Rule 15.02, *Amendments to Conform to the Evidence*, is the same as Rule 15(b) of the Federal Rules of Civil Procedure. It provides that "amendments necessary to cause the pleadings to conform to the evidence and to raise issues actually tried by express or implied consent may be permitted on motion **at anytime, even after judgment**. Bertelsman and Philipps, Ky. Prac. 4th Ed., Civil Rules 1502.

By its failure to object and -- more significantly -- by its active participation in producing the evidence relating

to Jones's 1999 injury and its effects, the Hospital waived any argument that the issue was not properly before the ALJ for his resolution. There was no unfair surprise or actual prejudice to the Hospital resulting from the ALJ's treatment of the evidence of the two work-related events as having combined to cause Jones's impairment. Nucor, supra, at 146.

Furthermore, unlike the two injuries in Kroger, which affected different areas of the claimant's body, the two injuries sustained by Jones both affected her lower back. The ALJ was wholly justified in finding that they constituted a series of traumas resulting in functional impairment. KRS 342.001(1) defines *injury* to mean:

any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. (Emphasis added.)

There is no doubt that it would have been better practice for Jones to have presented a theory of impairment encompassing both traumatic events. However, the Board's reversal of the ALJ's award because of her failure to plead with particularity the effect of the earlier injury is wholly at odds with the spirit

and purpose of KRS³ Chapter 342 -- namely, to compensate injured workers whenever possible.

We also hold that the Board erred in assessing the evidence to preclude any award of partial disability based on cumulative injury. The Board concluded that the evidence was "uncontroverted" that Jones's 5% impairment was "solely the result of her 1999 injury." (Board's opinion, p. 26). In so reasoning, the Board determined that Dr. Frank Wood was the only expert witness both to offer an AMA impairment rating and to address the issue of medical causation. The Board is correct that Dr. Wood attributed all of Jones's impairment to her 1999 injury. Because it believed that there was no other expert evidence linking Jones's impairment to the 2000 injury, the Board held that the ALJ erred in making an award for permanent partial disability benefits (except TTD and medical benefits).

We believe that the Board has failed to accord proper deference to the ALJ in his role as sole fact-finder. It is true that the 1996 amendments to KRS 342.730 have significantly restricted an ALJ's discretion when determining the extent of a worker's permanent partial disability. Awards for permanent partial disability are now a function of the worker's AMA impairment rating -- subject to certain statutory multipliers. However, the ALJ still retains the discretion to determine as a

³ Kentucky Revised Statutes.

threshold matter whether (and when) a claimant has sustained a work-related impairment.

Although the [Workers' Compensation] Act underwent extensive revision in 1996, the ALJ remains in the role of the fact-finder, KRS 342.285(1). It is among the functions of the ALJ to translate the lay and medical evidence into a finding of occupational disability. Although the ALJ must necessarily consider the worker's medical condition when determining the extent of his occupational disability at that particular point in time, the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured. (Emphasis added.)

McNutt Construction/First General Services v. Scott, Ky., 40 S.W.3d 854, 859 (2001).

As the appellate courts of this state have consistently held, the ALJ as fact-finder "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." Whittaker v. Rowland, Ky., 998 S.W.2d 479, 481 (1999); Halls Hardwood Floor Co. v. Stapleton, Ky.App., 16 S.W.3d 327 (2000). Thus, the ALJ was entitled to believe Dr. Wood's opinion that Jones had sustained a 5% functional impairment while at the same time rejecting his opinion that the impairment was solely caused by the 1999

injury. The ALJ was entitled to believe other evidence (*i.e.*, Dr. Bilkey's medical records and Jones's own testimony) indicating that Jones's impairment resulted from a combination of the two documented incidents -- identical events separated by only four months affecting her lower back. Thus, we conclude that the ALJ's finding that the impairment resulted from the effects of the two injuries is supported by substantial evidence. We hold that the Board erred in concluding otherwise.

Accordingly, the opinion of the Workers' Compensation Board is vacated, and the matter is remanded to the Board with directions that it reinstate the opinion and award of the ALJ.

JOHNSON, JUDGE, CONCURS.

MINTON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MINTON, JUDGE, DISSENTING. I would affirm the Workers' Compensation Board's decision reversing the ALJ. The Board properly held that the ALJ abused his discretion by his "sua sponte determination utilizing Jones' 1999 injury as the basis for an award of benefits."

There is no doubt that both Jones and Baptist were fully aware of, and the lay and medical evidence before the ALJ dealt with, the 1999 work-related injury. However, as the Board observed, both sides also believed that the 1999 claim was barred by the applicable statute of limitations, KRS 342.185(1).

Most importantly, the parties pled, practiced, tried, and briefed this case to the ALJ on the single theory of the compensability of the 2000 injury. Accordingly, I disagree with the conclusion that either party under these facts impliedly consented to consideration of the 1999 injury as a potentially compensable claim. Moreover, as the majority states, our Supreme Court in Nucor, supra, at 146, adopted the actual prejudice test to be applied when a claim has been tried by implied consent. The prejudice here is that Baptist has been denied the opportunity fairly to present a defense to the 1999 claim. Applying a broad reading of implied consent under CR 15.02 to these facts undermines the purpose of KRS 342.270 (1).

BRIEF FOR APPELLANT:

George R. Carter
Louisville, Kentucky

BRIEF FOR APPELLEE:

Douglas A. U'Sellis
Louisville, Kentucky