RENDERED: May 7, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001938-WC

VOLT SERVICES — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-82457

MICHAEL THORNTON; HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JOHNSON, KNOPF AND McANULTY, JUDGES.

JOHNSON, JUDGE: Volt Services has petitioned for review of an opinion of the Workers' Compensation Board entered on August 13, 2003, which reversed the Administrative Law Judge's decision awarding Michael Thornton benefits based upon a 5% whole body impairment rating, and ordered that the matter be remanded with instructions to enter an award based upon a 12% impairment

rating. Having concluded that the Board erred by reversing the ALJ's decision, we reverse and remand for further proceedings.

Thornton began working with Volt Services in Louisville, Kentucky, around January 2000. Approximately one month later, Volt Services assigned Thornton to work at Dynacraft on an assembly line. In April 2000 Dynacraft laid off several workers from the assembly line, including Thornton. However, shortly thereafter, Thornton accepted Dynacraft's offer to come back and to work as a trash collector. As a trash collector, Thornton would gather trash from around the workplace, which he would then carry outside and place in a dumpster. According to Thornton's deposition testimony, this job often required him to lift heavy objects above his head in order to place them in the dumpster.[1]

On May 30, 2000, Thornton was attempting to move a metal "dock plate" when he injured his lower back. According to Thornton, the dock plate's automated mechanisms had become stuck, and he was forced to try and move the plate manually by pulling on the attached chain. The following day, Thornton went to the emergency room at Baptist Hospital East, where he was then referred to Baptist Worx for treatment. At Baptist Worx, Thornton was given pain pills and muscle relaxers, and was

[1] Thornton testified that he lifted garbage cans weighing approximately 50 pounds when empty, and that he sometimes lifted heavy objects such as car doors.

eventually sent back to work at full-duty. Thornton testified that he initially resumed his previous duties as trash collector, but that after two or three days he began light-duty assignments, which included mopping and sweeping. Thornton continued the light-duty assignments until he ceased working at Dynacraft in approximately July 2000.

Thornton apparently experienced difficulties in getting medical treatment through Volt Services's workers' compensation carrier. As a result, Thornton was not thoroughly examined by a treating physician until mid-to-late 2001. On September 25, 2001, Dr. Andrew DeGruccio ordered an MRI on Thornton's back. Among other things, this MRI revealed a disc herniation at the L5-S1 level on the right side of Thornton's back, and a central disc bulge at the L4-5 level on the left side of his back. At that time, Thornton was primarily experiencing pain and discomfort in his right side and right leg.

Thereafter, Thornton was referred to Dr. Dante Morassutti, a neurosurgeon, who recommended micro discectomy surgery at the L5-S1 level to relieve the pain on Thornton's right side. However, just prior to undergoing surgery, Thornton informed Dr. Morassutti that he was no longer experiencing severe pain on his right side, and that the pain had apparently shifted to his left side. Consequently, after ordering another

MRI, Dr. Morassutti canceled the micro discectomy surgery, believing that Thornton's pain was due to the disc bulge at the L4-5 level on the left side of his back.

On or around June 19, 2002, Thornton submitted to an independent medical evaluation by Dr. John Guarnaschelli. Dr. Guarnaschelli noted that Thornton "has both clinical and radiographic evidence of low back, left hip and left leg pain." Dr. Guarnaschelli opined that Thornton's symptoms were directly related to the injury he suffered at work on May 30, 2000. Dr. Guarnaschelli further stated that Thornton was not a candidate for surgery and that he had reached maximum medical improvement. Ultimately, Dr. Guarnaschelli recommended physical therapy to help alleviate Thornton's symptoms and assigned him a 5% whole body impairment rating.

Approximately two months later, Dr. John Lach performed another independent medical evaluation on Thornton. Dr. Lach agreed that Thornton had reached maximum medical improvement, that he was not a candidate for surgery, and that physical therapy would be a beneficial course of treatment. However, based upon Thornton's complaints of pain in his right side, and an MRI showing "degenerative disc disease at [ ] L5-S1 with eccentric to the right disc protrusion at L5-S1 touching the right S1 nerve root," Dr. Lach opined that Thornton's whole body impairment rating should be "slightly higher."

Dr. Lach stated that Thornton had "lesions on opposite sides that cause opposite problems," i.e., the disc herniation at the L5-S1 level was causing problems with Thornton's right side, and the disc bulge at the L4-5 level was causing problems with Thornton's left side. Hence, Dr. Lach assigned an additional 7% to Thornton's impairment rating to account for the problems on the right side of his body, which resulted in a 12% whole body impairment rating.

Approximately three weeks prior to Dr. Lach's evaluation, Thornton on July 31, 2002, filed an application for resolution of injury claim with the Department of Workers' Claims. The reports of Dr. Guarnaschelli and Dr. Lach, as well as Thornton's deposition testimony, were offered into evidence. At a benefit review conference held on December 4, 2002, the parties stipulated, inter alia, that Thornton had received temporary total disability (TTD) benefits in the amount of $206.68 per week from May 31, 2000, through July 2, 2002, and that Volt Services had paid $11,629.84 in medical expenses. The only contested issue was the extent and duration of Thornton's disability.

A final hearing on the matter was held on January 3, 2003. Thornton testified that he continued to experience numbness and pain in both legs and spasms in his back. After considering all of the evidence, the ALJ entered an opinion,

order, and award on February 28, 2003. The ALJ awarded Thornton permanent partial disability (PPD) benefits based upon a 5% whole body impairment rating.[2] Specifically, the ALJ stated:

> After careful review of all the medical evidence and lay evidence in this claim, the [ALJ] is persuaded by the opinion of Dr. Guarnaschelli, neurosurgeon, who found that [ ] Thornton suffered a 5% functional impairment rating as a result of his work-related injury. This is consistent with [ ] Thornton's testimony at the [h]earing that his legs bother him. His left leg will go numb while he has pain in both legs. This is consistent with the testimony given by Dr. Lach wherein [ ] Thornton advised him that at the time Dr. Morassutti was to perform the L5-S1 surgery that [ ] Thornton really was not having severe right-sided pain, and that now the pain was more on the left side. That side was more consistent with the L4-L5 disk bulge on the left. Therefore, this evidence persuades the [ALJ] the 5% rating given by Dr. Guarnaschelli is more accurate as it appears that the right leg problems had resolved to the point where surgical intervention was not now necessary.

Thornton then appealed to the Board. In a 2-1 decision entered on August 13, 2003, with Member Stanley dissenting, the Board reversed the ALJ and remanded with instructions to enter an award based upon a 12% impairment rating. The Board determined that Dr. Lach's opinion regarding

[2] Thornton was awarded $172.79 per week in TTD benefits for the period beginning on May 31, 2000, through July 2, 2002, with Volt Services receiving a credit for any amounts already paid. In addition, Thornton was awarded $9.78 per week plus interest, in PPD benefits for 425 weeks beginning on July 3, 2002. Finally, Volt Services was also ordered to pay for Thornton's vocational rehabilitation evaluation pursuant to Kentucky Revised Statutes (KRS) 342.710.

the disc herniation at the L5-S1 level was "uncontroverted" in the record of evidence. The Board stated that it was unclear from examining Dr. Guarnaschelli's report whether he was asked to consider the possible disc herniation at the L5-S1 level. Hence, relying on this Court's decision in Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc.,[3] the Board reversed the ALJ stating that it was "error for the ALJ to reject uncontradicted medical evidence of record without sufficient explanation for rejection of that evidence." Volt Services's petition for review followed.

Volt Services's sole claim of error is that the Board erred by reversing the ALJ's decision to award Thornton benefits based upon a 5% whole body impairment rating. In particular, Volt Services argues:

> [T]he [ALJ] below was presented conflicting medical evidence with the reports of Drs. Guarnaschelli and Lach. As the [ALJ] [o]pinion, [o]rder and [a]ward illustrates, the [ALJ] considered the conflicting reports. In fact, the [ALJ] went to great lengths in his [o]pinion to put forth his basis for finding the report of Dr. Guarnaschelli to be the more credible evidence. . . . Based upon his consideration of the evidence, the [ALJ] found the [5%] rating ascribed by Dr. Guarnaschelli to be the more accurate opinion and awarded benefits to [Thornton] accordingly.

[3] Ky.App., 618 S.W.2d 184 (1981).

Volt Services claims that the Board erred by "reevaluating the evidence previously considered by the [ALJ] and reversing the [ALJ's] decision." We agree.

The proper interpretation of the American Medical Association's Guides to the Evaluation of Permanent Impairment with respect to orthopedic injuries is a complex issue that requires medical expertise. When medical experts differ with respect to an injured worker's impairment rating and the proper application of the Guides, it is the ALJ's function to weigh the conflicting evidence and to decide which is more persuasive.[4] As fact-finder, the ALJ "has the sole authority to judge the weight to be afforded the testimony of a particular witness,"[5] and "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."[6]

When an ALJ's decision is appealed to the Board, KRS 342.285(2) mandates that "[t]he board shall not substitute its judgment for that of the [ALJ] as to the weight of evidence on questions of fact. . . ." Where the ALJ has made a factual finding, the Board is limited to determining whether there is

[4] Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985)(holding that the fact-finder "has the authority to determine the quality, character and substance of the evidence presented").

[5] Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88, 96 (2000)(citing McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974)).

[6] Id. (citing Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977)).

substantial evidence in the record supporting the ALJ's finding.[7] Substantial evidence has been defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men."[8]

Applying these principles to the facts of the case sub judice, we conclude that the Board erred by reversing the ALJ's determination that Thornton suffered from a 5% whole body impairment rating. The record shows that Dr. Guarnaschelli examined Thornton on or around June 19, 2002. In his report following this examination, Dr. Guarnaschelli opined that Thornton "has both clinical and radiographic evidence of low back, left hip and left leg pain with both radiographic and X-ray evidence based on MRI scanning of a central and a left paracentral disc protrusion without an obvious extrusion." Based upon this evaluation, Dr. Guarnaschelli assigned Thornton a 5% whole body impairment rating.

As the ALJ noted, Dr. Guarnaschelli's opinion that Thornton's pain and discomfort stemmed from an injury to the left side of his back, was consistent with Dr. Morassutti's decision to cancel the surgery that had been planned for the right side of Thornton's back at the L5-S1 level. As we mentioned above, Dr. Morassutti determined that surgery at the

[7] Addington Resources, Inc. v. Perkins, Ky.App., 947 S.W.2d 421, 423 (1997).

[8] Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367, 369 (1971).

L5-S1 level was not necessary after Thornton advised him that he was no longer experiencing severe pain on the right side of his body. Hence, we conclude that there was substantial evidence in the record supporting the ALJ's finding that Thornton suffered from a 5% whole body impairment.

Although there was evidence in the record suggesting that Thornton's impairment rating should be higher, e.g., Dr. Lach's report and Thornton's testimony, the mere fact that the ALJ was presented with evidence which could have warranted a different result does not compel a reversal on appeal.[9] Accordingly, since there was substantial evidence supporting the ALJ's decision to award Thornton benefits based upon a 5% whole body impairment rating, the Board erred by reversing the ALJ's finding on this issue.

As we mentioned previously, when the Board reversed the ALJ and ordered that Thornton be awarded benefits based upon a 12% impairment rating, it relied on this Court's decision in Mengel, which stands for the proposition that when the issue is one which calls for the opinion of medical experts, the fact-finder may not ignore the uncontradicted conclusion of a medical expert.[10] According to the Board, since Dr. Guarnaschelli did

[9] Whittaker v. Rowland, Ky., 998 S.W.2d 479, 482 (1999).

[10] Mengel, 618 S.W.2d at 187. See also Magic Coal Co., 19 S.W.3d at 96 (stating that "[w]here the question at issue is one which properly falls within

not discuss the right side of Thornton's back in his report, Dr. Lach's opinion that Thornton should be assigned a higher impairment rating based upon the problems with the right side of his back was uncontradicted.[11] We reject this line of reasoning for two reasons.

First, there is nothing in Dr. Guarnaschelli's report indicating that he conducted anything less than a full examination of Thornton. In addition to conducting an in-office examination, Dr. Guarnaschelli stated that he also reviewed an x-ray and MRI of Thornton's back in reaching his opinion. Thus, we conclude that Dr. Lach's opinion regarding Thornton's impairment rating is more properly characterized as medical opinion which conflicts with Dr. Guarnaschelli's opinion, rather than an uncontradicted medical opinion. As such, it was within the province of the ALJ to weigh the credibility of the conflicting opinions and to make the required findings.[12]

Second, assuming, arguendo, that Dr. Lach's opinion could be characterized as uncontradicted, the ALJ retained the

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the province of medical experts, the fact-finder may not disregard the uncontradicted conclusion of a medical expert and reach a different conclusion").

[11] Specifically, the Board noted that Dr. Guarnaschelli's report was in the form of answering questions that had been posed to him in a cover letter. The Board stated that since the cover letter was not included in the record, it was unclear whether Dr. Guarnaschelli had considered the potential problems on the right side of Thornton's back. The Board therefore concluded that the value of Dr. Guarnaschelli's report was "obviously limited."

[12] Paramount Foods, Inc., 695 S.W.2d at 419.

authority to reject this opinion as long as he provided a sufficient explanation for doing so.[13] In the case at bar, the ALJ specifically stated that "[a]fter careful review of all the medical evidence and lay evidence," he considered "the 5% rating given by Dr. Guarnaschelli [to be] more accurate." The ALJ found that the 5% impairment rating, which was based primarily upon the problems with the left side of Thornton's back, was consistent with Thornton's testimony that the problems on his right side had subsided, and Dr. Morassutti's decision to cancel the surgery that had been scheduled for the right side of Thornton's back.

Therefore, even if Dr. Lach's opinion could be characterized as uncontradicted, the ALJ provided a sufficient explanation for rejecting that opinion and for choosing to follow the opinion given by Dr. Guarnaschelli. Accordingly, we reverse the opinion of the Board and remand with instructions to reinstate the opinion, order, and award of the ALJ, granting Thornton benefits based upon a 5% whole body impairment rating.

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[13] See Commonwealth v. Workers' Compensation Board of Kentucky, Ky.App., 697 S.W.2d 540, 541 (1985)(holding that the fact-finder was without authority to reject uncontradicted medical testimony absent a sufficient reason for doing so); and Collins v. Castleton Farms, Inc., Ky.App., 560 S.W.2d 830, 831 (1977)(quoting 3A Larson, Workers' Compensation Law § 80.20 (9th ed. 1976))(holding that the fact-finder may "'refuse to follow the uncontradicted evidence in the record, but when it does so, its reasons for rejecting the only evidence in the record should appear e.g., that the testimony was inherently improbable, or so inconsistent as to be incredible, that the witness was interested, or that his testimony on the point at issue was impeached by falsity in his statements on other matters. Unless some explanation is furnished for the disregard of all uncontradicted testimony in the record, the Commission may find its award reversed as arbitrary and unsupported'").

Based on the foregoing, the opinion of the Board is reversed and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Lyn A. Douglas Louisville, Kentucky	John M. Longmeyer Louisville, Kentucky