

RENDERED: May 27, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000208-WC

STEVEN PENICK

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-75608

UNITED PARCEL SERVICE;
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI, JUDGE; AND MILLER, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Steven Penick petitions this Court for review of an opinion of the Workers' Compensation Board ("the Board") affirming a decision of the Administrative Law Judge ("ALJ"). The ALJ dismissed Penick's claim for permanent occupational benefits, in which he alleged that he sustained a shoulder

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 100(5)(b) of the Kentucky Constitution and KRS 21.580.

injury during the course of his employment with United Parcel Service ("UPS"). For the reasons stated below, we affirm the Board's opinion.

Penick became employed with UPS in October 1997 as a part-time package handler. In mid-2000, he left UPS for one year, but then returned to UPS in his prior capacity. The position required heavy lifting and repetitive movement.

In July 2002, Penick sustained a right shoulder strain. After receiving medical treatment he returned to work without restriction. On July 21, 2003, Penick was sorting packages when he experienced a sharp pain in his right shoulder. He also had pain in his neck and trapezius area, and could barely move his shoulder. He received medical treatment and was able to return to work.

On August 5, 2003, Penick was involved in a motor vehicle accident. As a result of the accident, he received medical treatment at an emergency room for low back pain and pain in the left side of his neck. It was later determined that he had sustained two herniated discs in his neck. He also continued to have severe right shoulder pain, but would later testify that his right shoulder was not injured in the accident.

On September 23, 2003, Penick underwent right rotator cuff repair surgery performed by Dr. Stacie Grossfeld. He returned to work at UPS on January 8, 2004, and was restricted

to lifting 30 pounds at waist level and no more than eight pounds overhead.

Penick subsequently filed a claim seeking workers' compensation benefits. The matter proceeded before the ALJ who, upon taking proof, determined that Penick had suffered a complete tear of his right rotator cuff. The ALJ went on to find that 90% of the tear had been present for at least five years prior to date he sustained the injury at UPS. The ALJ found that while Penick continued to work until July 21, 2003, his impairment was present prior to the date he suffered the 10% tear.

The ALJ determined that the 10% tear was directly caused by his employment with UPS, and he awarded TTD benefits from August 13, 2003 to April 15, 2004 (the date that UPS's examining physician believed Penick reached maximum medical improvement). The ALJ awarded no permanent occupational disability benefits because the physicians indicated that the 10% tear attributable to Penick's employment, taken alone, would not qualify for an impairment rating under the A.M.A. Guidelines. Lastly, the ALJ awarded future medical expenses since the 10% tear attributable to the employment resulted in the need for surgery and TTD benefits.

Penick appealed to the Workers' Compensation Board. He argued that the ALJ erred in finding Penick to have a pre-

existing condition (i.e., the 90% tear). He also maintained that he had no occupational disability until the work incident of July 2003, but rather had a pre-existing dormant condition brought into disabling reality by the work incident. Upon considering the record, the Board affirmed the ALJ's opinion. This petition for review followed.

Penick now argues that the ALJ committed reversible error by finding a pre-existing active condition. He maintains that the ALJ should have interpreted Dr. Grossfeld's opinion and the other medical evidence to find that he had a pre-existing dormant condition brought into disabling reality by the work injury. He goes on to argue that as such, he was entitled to an award of PPD benefits and that the ALJ erred in failing to so rule.

We have closely examined the record and the written arguments, and find no basis for tampering with the Board's opinion affirming the ALJ's ruling. We must first note that contrary to Penick's assertion that Dr. Grossfeld's expert opinion provided no basis for concluding that Penick suffered a pre-existing active condition, Dr. Grossfeld stated in her deposition that the medical records showed Penick to be having right shoulder problems beginning as early as May, 2000. When questioned as to whether the medical records indicated that

Penick had "some active problems with this right shoulder before the injury date", Dr. Grossfeld responded "correct".

More important, PPD awards are based on impairment and not disability.² The Board's discussion of this issue bears repeating. It stated as follows:

Penick points to evidence in the record which indicates that he could perform his job prior to the work incident of July 2003. In other words, he argues he had no occupational disability until that time. The Kentucky Supreme Court, in Roberts Brothers Coal Co. v. Robinson, Ky., 113 S.W.[3]d 181 (2000), addressed the issue of active disability pursuant to the 1996 Act. The court explained that impairment and disability are not synonymous. Since the amendments to the Workers' Compensation Act in 1996, in cases of permanent partial disability[,] awards are based solely on a worker's impairment and not disability. Therefore, when there is an issue of a preexisting active condition in permanent partial disability awards the ALJ is to determine the worker's preexisting impairment and not disability. Whether a claimant is working prior to a work injury is of no consequence. Whether a claimant has a prior active "impairment" resulting in an exclusion from a potential permanent partial award must be determined in accordance with the Guides. Id. What is more, authority clearly holds the existence, cause, and onset of medical impairment ratings under the Guides are medical questions. Kentucky River Enterprises, Inc. v. Elkins, Ky., 107 S.W.3d 206 (2003).

We agree with the Board's assessment of Roberts Brothers Coal Co. and its effect on the issue at bar. The ALJ

² Roberts Brothers Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2000).

found that 90% of Penick's rotator cuff tear had been present for at least five years prior to the work-related injury. This finding was based on Dr. Grossfeld's observation of the tear during surgery and her conclusion that its degree of retraction indicated that the tear was many years old. Dr. Grossfeld also testified that she would have assessed no impairment rating for the 10% work-related tear taken alone. Evidence existed in the record in support of the ALJ's findings. As such, the Board properly concluded that the ALJ correctly found that all of Penick's impairment pre-dated the July 2003 event, and that this finding was supported by substantial evidence.³ Accordingly, we find no error on this issue.

For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ched Jennings
Louisville, KY

BRIEF FOR APPELLEE, UNITED
PARCEL SERVICE:

James G. Fogle
Lance O. Yeager
Louisville, KY

³ Roberts Brothers Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2000).