

RENDERED: FEBRUARY 10, 2006; 2:00 P.M.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2005-CA-000880-WC

CARTER LEE TURNER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-03-79201

DIXIE FUEL COMPANY; HON. MARCEL  
SMITH, ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Carter Lee Turner has petitioned for review of an opinion of the Workers' Compensation Board entered on March 25, 2005, which affirmed the Administrative Law Judge's award of permanent partial disability benefits for a work-related back injury Turner sustained while employed by Dixie Fuel Company. Having concluded that in assessing the evidence, including the opinion of Dr. James Bean that only 70% of Turner's 7% impairment was work-related, the Board did not commit an error

so flagrant as to cause gross injustice,<sup>1</sup> we affirm. We quote, in relevant part, from the well-written Board opinion by Chairman Gardner and adopt that portion of the opinion as our own:

Turner, born March 14, 1963, has an eighth grade education, has not earned his GED, and has no vocational training. His work history consists of employment as a grocery stocker, security guard, delivery truck driver, and coal miner. He began working as an underground coal miner in 1989. Turner was employed as a roof bolter by Dixie Fuel.<sup>2</sup> He testified he worked in low coal, requiring him to work in a kneeling position with his head bent to the side while performing heavy lifting.<sup>3</sup>

Turner sustained a work injury on July 7, 2003[,] while hanging cable. He explained he was squatting on his tiptoes reaching to hang a length of cable from a roof bolt when a co-worker jerked the cable, bending Turner forward then backward. The sixty pounds of cable struck him across the lower back, knocking him on his knees and elbows.<sup>4</sup> He reported the injury to management and continued to work his shift. Turner testified he left work an hour early to seek medical treatment.

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<sup>1</sup> Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992)

<sup>2</sup> Turner testified that he had worked for Dixie Fuel since 2001 and that he worked approximately 57 hours each week.

<sup>3</sup> Turner stated in his application that in his job he frequently had to crawl, crouch, kneel, bend, push and pull forcefully, and lift objects weighing five to 130 pounds.

<sup>4</sup> Turner testified that both the strike of the cable and the bending of his back are what injured him. He complained of pain in his low back and in his left hip, radiating to his knee.

Turner explained that when he sought medical attention on July 7, 2003, he thought the pain he was experiencing was due to a prostate infection. He saw Dr. Sharon Colton at the Clover Fork Clinic and she prescribed antibiotics. When Turner's pain did not improve by July 10, 2003, he again saw Dr. Colton and related the details of his work injury. She excused him from work for his back condition and he has not returned to work since.<sup>5</sup>

Dr. Colton referred Turner to physical therapy. MRI films recommended by the physical therapist revealed a moderate left herniated disc at L4-5 and a mild disc bulge at L5-S1.<sup>6</sup> Turner first saw Dr. Bean on September 29, 2003, on referral from Dr. Colton. Dr. Bean recommended physical therapy including work hardening. Turner testified that physical therapy did not help his symptoms.

At his hearing, Turner testified he suffers from frequent low back and bilateral leg pain. He has trouble sleeping and when the pain is intense, he sits in a recliner and applies heat to his back. Turner testified he has tried to find lighter work and has applied for employment at grocery and home improvement stores.

At his deposition and hearing, Turner was questioned concerning prior back injuries. He stated that in 1996 he was struck by falling rock, which resulted in a pulled muscle in his back. He testified he was treated at the Clover Fork Clinic for this injury, missed about a week of work, and the pain resolved. Turner also

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<sup>5</sup> Turner filed an application for resolution of injury claim on February 23, 2004, which was denied on May 24, 2004. Dixie Fuel based its denial on lack of proof of causation and overpayment of temporary total disability benefits as to the number of weeks.

<sup>6</sup> The MRI was performed on September 18, 2003.

testified that in May 2002, he was picking up a can of oil and sustained an injury to his shoulder and back. He stated he was placed on light duty and did not miss any work following this incident. Turner was questioned concerning a February 6, 2002[,] visit to the Clover Fork Clinic where he gave a history of back pain and right knee pain. He stated he had hurt his knee and left hip crawling through the mines. Turner did not miss any work due to this incident. He testified that prior to the July 7, 2003[,] injury, his back was fine.

Turner relied on a report from Dr. Krista Muckenhausen who evaluated him on April 6, 2004. Dr. Muckenhausen took a history of Turner's complaints, performed a physical examination, and reviewed medical records and diagnostic studies. Dr. Muckenhausen diagnosed status post low back strain with lumbosacral radiculopathy, maximally left secondary to work injury on July 7, 2003; disc herniation at L4-5 of moderate degree, eccentric to the left with disc bulge at L5-S1 and diffuse disc bulging at L5-S1, secondary to work-related accident on July 7, 2003; anxiety, depression and sleep disturbance in context with chronic pain syndrome, secondary to work-related accident on July 7, 2003; and, early restrictive lung condition, pneumoconiosis and chronic coal dust exposure. In her original report, Dr. Muckenhausen assessed a 13% impairment for a DRE lumbar Category III impairment. She assigned an additional 3% for pain and 10% impairment for anxiety. In a supplemental report, Dr. Muckenhausen assessed a 16% impairment for the lumbar and pain conditions.<sup>7</sup>

The medical records of Dr. Bean were attached to Turner's Form 101 and Dr. Bean was deposed by Dixie Fuel. Dr. Bean began

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<sup>7</sup> Dr. Muckenhausen assigned a 13% impairment for lumbar and a 3% impairment for pain.

treating Turner on September 29, 2003[,] for complaints of back pain radiating into his right leg and hip. Dr. Bean reviewed the MRI scan which showed a disc herniation at L4-5 on the left. He noted the herniated disc was opposite to the side of Turner's principal pain. Turner had positive straight leg raising on the left side<sup>8</sup> and Dr. Bean found no sensory or reflex abnormality on either side on examination. His initial impression was lumbar sprain, right radicular pain, and left herniated disc at L4-5. He noted the disparity in the herniated disc and side of Turner's pain, and believed surgery would be of little benefit. Dr. Bean recommended Turner stay in physical therapy and he prescribed Lorcet and Skelaxin.<sup>9</sup> When seen on November 3, 2003, Dr. Bean recommended a full work hardening program.<sup>10</sup> On December 1, 2003, Dr. Bean recommended Turner undergo a functional capacity evaluation to find his current work capacities.<sup>11</sup> In a report dated February 5, 2004, Dr. Bean opined Turner reached maximum medical improvement as of January 15, 2004.<sup>12</sup> He indicated the work restrictions<sup>13</sup> listed in the functional capacity evaluation<sup>14</sup> were permanent and Turner was not able to return to work. Dr. Bean stated "[Turner's] impairment rating is

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<sup>8</sup> Dr. Bean also noted that Turner had a straight leg raise on the right side.

<sup>9</sup> Dr. Bean also kept Turner off work during this time.

<sup>10</sup> On this date, Turner was still in physical therapy and having continued pain in his back with some improvement.

<sup>11</sup> Dr. Bean also stated that Turner had modest improvement with physical therapy, but that he did not believe he was going to reach full work capacity.

<sup>12</sup> This opinion was supported by a letter from Dr. Colter written on the same date. AIG Claims Services, Inc. notified Turner that his lost wage benefits terminated effective January 15, 2004.

<sup>13</sup> These restrictions included 30 pounds lifting, and occasional bending or twisting, but no more than 8% of the time.

<sup>14</sup> This evaluation was conducted on January 5, and January 7, 2004.

7% by AMA Guidelines, Category II, 30% pre-existing and 70% related to injury."

At his deposition, Dr. Bean reviewed his findings. He explained the MRI showed the herniated disc at L4-5 on the left but since Turner's pain was on the right, the herniated disc was not reflective of his leg pain though it may have been part of his back pain. Concerning Turner's impairment rating, Dr. Bean explained that he placed Turner in a DRE Category II for 5% and gave him an additional 2% for pain. He did not place Turner in a Category III because he did not have true radicular findings that would warrant a Category III. Dr. Bean disagreed with Dr. Muckenhausen's assessment of a Category III, because other than Turner's non-verifiable radicular complaints, he did not have any other signs of nerve root injury or radiculopathy. Dr. Bean testified he used the restrictions that were estimated from a functional capacity evaluation. Dr. Bean was also questioned concerning medical records from Clover Fork Clinic and from Dr. Colton. Counsel for Dixie Fuel reviewed records from Clover Fork Clinic indicating Turner had been previously seen for complaints of low back pain on March 28, 2002[,] and compared it with the entry dated July 10, 2003. The July 10, 2003[,] record stated "patient reports that his back has gotten worse." Dr. Bean was asked whether the records reflected on the causation of Turner's back complaints. Dr. Bean answered as follows:

Well, it may reflect back to that prior report dated March '02, but that's quite a long time before that. But, anyway, he had complaints of back pain previously. It's not quite clear what that really means to me.<sup>15</sup>

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<sup>15</sup> Dr. Bean testified that he had no history of Turner having back pain, except as reflected in physical therapy notes that he had low back strain seven years prior to the 2003 injury.

The records of Clover Fork Clinic were introduced into the record.<sup>16</sup> Turner was seen on February 6, 2002[,] for complaints of right knee pain and low back pain from working in low coal. Straight leg raising was negative and he was prescribed Ibuprofen. He was seen again on March 28, 2002[,] for complaints of back pain from working in low coal.<sup>17</sup> Again he had negative straight leg raising and was given a prescription for Skelaxin and a refill on the Ibuprofen. Turner was seen on May 1, 2002[,] for complaints of shoulder and back pain after picking up a five gallon can of oil. He had tenderness in the thoracic spine. Turner was given a prescription for Ibuprofen and Skelaxin. He was seen again on May 13, 2002[,] for a follow-up for the shoulder and upper back. Turner was next seen on July 7, 2003[,] for complaints of back pain and diagnosed with prostratitis. When seen on July 10, 2003, Turner gave a history of the work injury and reported his back had gotten worse. He was sent for an x-ray and given a prescription for Voltarin, Skelaxin and Lorcet plus. He continued to see Dr. Colton on a regular basis and was referred to Dr. Bean on September 23, 2003.

The ALJ reviewed the lay<sup>18</sup> and medical evidence in the record and awarded Turner benefits<sup>19</sup> for permanent partial occupational

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<sup>16</sup> Turner also had a history of being seen for tension headaches and had a hernia repair several years prior to the injury.

<sup>17</sup> Turner testified that this event of low back pain was due to a prostate infection.

<sup>18</sup> Turner testified that he would have returned to work at the mine, but there was no light duty work available. He also testified that he had applied for other jobs around town. He stated that he could no longer mow his yard or go hunting or fishing. He also testified that he continued to have a throbbing, steady pain and it hurt to sit for long periods of time.

<sup>19</sup> The ALJ stated in her opinion that based on all evidence, Turner did sustain an injury as defined by the Worker's Compensation Act.

disability, declining to find him totally occupationally disabled. She awarded benefits based on Dr. Bean's 7% impairment rating, reasoning as follows:

In the absence of total disability, plaintiff's disability is computed pursuant to KRS 342.730. Clover Fork records indicate prior low back pain. I am persuaded by Dr. Bean's opinion regarding impairment and apportionment. Dr. Bean attributed 70% of 7% impairment to the injury. His opinions are well reasoned and supported by objective medical evidence. I am persuaded by Dr. Bean that 70% of the 7% impairment was caused by the work injury. 70% of 7% impairment is 4.9%.

The ALJ then applied the three multiplier of KRS 342.730(1)(c)1.<sup>20</sup>

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<sup>20</sup> The ALJ also stated in her opinion as follows:

It must next be determined whether KRS 342.730(1)(c)1 applies. Does plaintiff retain the physical capacity to return to the type of work he performed at the time of his injury. I am persuaded by the opinions expressed in the functional capacity evaluation. The opinions are well supported by objective medical opinions. Plaintiff has physical restrictions as the result of his work injury. I find that plaintiff does not retain the physical capacity to return to the type of work he performed at the time of injury. KRS 342.730(1)(c)1 applies. Post injury, did plaintiff return to work at a weekly wage equal to or greater than his average weekly wage at the time of injury? Plaintiff testified that he worked one day, July 9, 2003[,] and has not earned wages since that date. I find that this one day attempt is not sufficient to trigger application of KRS 342.730(1)(c)2. Plaintiff did not return to work at a weekly wage equal to or greater than his average weekly wage at the time of injury. KRS 342.730(1)(c)2 does not apply. The 4.9% becomes 3.185% under KRS 342.730(1)(b). It is multiplied by 3.2 under KRS 342.730(1)(c)1 and (1)(c)3. Plaintiff has less than a 12th grade education.

Thereafter, both parties filed petitions for reconsideration. Turner argued there was no adequate proof to substantiate a 30% carve out as non-compensable based on Dr. Bean's evidence. The ALJ sustained Dixie Fuel's petition for reconsideration concerning the calculation of the award<sup>21</sup> and Turner's petition for reconsideration was overruled.<sup>22</sup>

On appeal,<sup>23</sup> Turner argues the ALJ erred in relying upon the evidence of Dr. Bean to conclude 30% of the 7% impairment was non-compensable. He contends Dr. Bean's evidence is too equivocal to constitute substantial evidence upon which the ALJ could rely. He also argues that pursuant to McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 859 (Ky. 2001), not all preexisting conditions must necessarily be found non-compensable. In the alternative, Turner argues the ALJ should have based her decision on Dr. Muckenhausen's impairment analysis because only this physician conducted a thorough neurological examination as required by the American Medical Association, Guides to the Evaluation of Permanent Impairment ("Guides").

The Kentucky Supreme Court, in Roberts Brothers Coal Co. v. Robinson, [113 S.W.3d 181 (Ky. 2003)] addressed the issue of active disability pursuant to the 1996 Act.

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The final issue is whether there was underpayment of TTD benefits. I am persuaded by Dr. Bean's report and find that plaintiff reached maximum medical improvement on February 5, 2004. He is entitled to TTD benefits until that date.

<sup>21</sup> The ALJ changed the date of Turner's maximum medical improvement to January 15, 2004, instead of February 5, 2004, and calculated the benefits awarded by the maximum benefit rate for permanent partial disability, instead of the maximum benefit rate for permanent total disability.

<sup>22</sup> The ALJ entered an order stating such on December 6, 2004.

<sup>23</sup> The appeal was filed on December 9, 2004.

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 occupational disability, awards are based solely on a worker's impairment and not disability. Therefore, when there is an issue of a preexisting condition in permanent partial disability awards the ALJ is to determine the worker's preexisting impairment and not disability. 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, 107 S.W.3d 206 (Ky. 2003).

In the unpublished case of Reinbold v. Ford Motor Co., 2004 WL 1907756 (Ky. 2004), the Kentucky Supreme Court discussed the impairment versus disability standard enunciated in Robinson, supra. The court concluded that as a general rule in permanent partial disability cases "[a]ny pre-existing impairment must be excluded when determining the impairment that is compensable." Reinbold at p. 3 [emphasis original].

The supreme court decisions in Robinson and Reinbold instruct that the occupational disability standard existing prior to December 12, 1996[, ] no longer applies to awards of permanent partial disability. When a work-related injury is superimposed on a preexisting impairment, the employer is only liable for the increase. Any measurable impairment existing prior to a work-related injury to the same body part must be apportioned and found non-compensable when the claimant sustains a subsequent injury. There is no requirement for the preexisting impairment to be vocationally limiting. If there is a measurable preexisting impairment under the Guides, that impairment cannot be viewed as being proximately caused by the subsequent

injury. On the other hand, it is well established that an injury which arouses a preexisting dormant non-disabling condition remains compensable. McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 859 (Ky. 2001).

While Turner's previous back condition may not have been vocationally limiting, the issue is whether the medical evidence supports the conclusion that the work injury was superimposed on a preexisting impairment, [causing] an increase in impairment.

Dixie Fuel bears the burden of proving a non-compensable preexisting condition. Since it was successful before the ALJ, the only issue on appeal is whether the ALJ's decision is supported by substantial evidence. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979); Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Substantial evidence is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

Here, Dixie Fuel introduced medical evidence from Dr. Bean that a portion of Turner's 7% impairment rating was not due to the work injury. As stated, the existence, cause, and onset of medical impairment ratings under the Guides are medical questions. Kentucky River Enterprises, Inc. v. Elkins, supra. Even though Dr. Bean's opinion may have fallen short of the mark to convince another fact finder, we are without any authority to conclude this evidence was so lacking in probative value that it must be disregarded as a matter of law. Stated otherwise, Dr. Bean's apportionment constitutes substantial medical evidence upon which the ALJ could rely, and her opinion is not wholly unreasonable.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Sherry Brashear  
Harlan, Kentucky

BRIEF FOR APPELLEE:

Timothy J. Walker  
Lexington, Kentucky