

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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001832-WC

LINDA ROSS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-99906

THREAVE MAIN STUD;
HON. SCOTT BORDERS, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Linda Ross petitions this Court to review an opinion of the Workers' Compensation Board (the Board) entered August 5, 2005, which affirmed the Administrative Law Judge's (ALJ) dismissal of Ross's claim rendered by opinion and order on March 30, 2005. We affirm.

In December 2003, Ross allegedly suffered a work-related injury when she was kicked in the right knee by a horse. Ross filed a workers' compensation claim alleging total disability. Threave Main Stud (Threave) was Ross's employer. At the hearing, Threave argued that Ross's right knee condition was simply an exacerbation of an ongoing condition caused by a work-related injury in February 2003. Threave pointed out that the February 2003 work-related injury claim was settled, and Ross waived her right to future medical benefits. In March 2005, the ALJ entered his opinion and order; therein, the ALJ was persuaded by the expert testimony of Dr. Timothy Wagner that Ross suffered no permanent injury as a result of the December 2003 incident. Specifically, the ALJ found that Ross "suffered nothing more than at [sic] temporary exacerbation of her ongoing symptomatic right knee condition for which she received appropriate medical treatment." The ALJ dismissed her claim. Being unsatisfied with the ALJ's decision, Ross sought review with the Board. The Board, by opinion entered August 3, 2005, affirmed the ALJ's dismissal of Ross's claim. This review follows.

Ross's sole contention of error is that the ALJ erred by relying upon Dr. Wagner's opinion that she suffered no

permanent impairment from the December 2003 injury.¹ In particular, Ross believes that Dr. Wagner's opinion is flawed because he failed to properly utilize the American Medical Association's, Guides to the Evaluation of Permanent Impairment (Guides). Ross perceives Dr. Wagner as using an "unacceptable freestyle approach" in utilizing the Guides. In support thereof, Ross cites to the following testimony of Dr. Wagner:

Q Okay. You agree with me that that same table, 1733, it also says if you have a nondisplaced healing fracture of the patella, that's another 3 percent whole person impairment?

A Let me see. Normally, if they heal, they don't give you a percentage.

Q I'm looking at page 546.

A Okay. Let's see. Knee, patell.

It says, patella fracture, undisplaced, healed, 3 percent whole person.

And the reason I did that, I didn't give her a percentage, is because it didn't involve the articular part. It was the inferior pole. And on the anatomy of the patella, you'll have kind of the articular surface, and then the top of it's larger. And since that did not involve the articular surface, that's why I didn't give it, because if you - you could actually take that little fragment out, doing a hemi-patellectomy, and what I'm looking for is the result. And so therefore, it didn't

¹ In her brief, appellant cited to an unpublished opinion of this Court. Although appellant states that she is not citing the opinion as authority but only as example, we view such distinction as being merely illusory. We also note that unpublished opinions, while may be informative, have no precedential value to this Court and will not be considered.

have anything to do with function, and that's why I didn't give it to her.

Q Okay. You agree this section makes no differential as to whether the fracture's on the articular surface, it just says patella fracture, correct?

A Yes, sir. That's why it says on the title guides, not absolute.

Q Okay. You agree with me if you try to go by the letter of the guides, then this woman qualifies for a 3 percent based upon patellar fracture?

A That's in the guides, yes, sir. And as I stated before, I gave my reasons why I didn't give that, because it did not involve the articular surface and it was - in two different tests it was a suspected one. So therefore, that's why I didn't give that.

Q Nonetheless, you still listed it on your notes as your diagnosis correct?

A Yes, sir, I gave that, that's true. But it didn't interfere with function and it was not part of the articular surface. And if you'll look at the next one down there, they give you an increased impairment for a patellar fracture, nondisplaced, and what they mean by that is if it involves the articular surface, where you would have a step-off on the undersurface of the patella or the kneecap involving the articular cartilage.

Q So you get more impairment if the fracture is to the articular surface?

A No, if it's on a step-off. Look at your next one down there, the next one down under kneecap. But what they're doing there is basically that guideline involves - that one is for the articular surface, because the next one down gives you a higher

percentage if the articular cartilage has a step-off, and that's another reasons why I don't think she would qualify for that.

Q Okay. If the judge wants to believe a literal interpretation of the AMA Guides, she gets the 3 percent, right?

A But you have to qualify that, and the judge has to know that that has to deal with the articular surface. And if it doesn't have to do with the articular surface - and in her particular case, it doesn't - therefore, in the literal sense, it's a nondisplaced fracture, it's the inferior pole. But if you look at the x-rays and you see it, it doesn't involve the joint surface. That's why I don't think that's applicable.

Q Okay. But you also agree that that section that gives the 3 percent makes no differentiation of whether the fracture is to the articular surface or to the interior pole, correct?

A That is correct, But that's why I said if you go to the next one down, the next impairment involving the patella, that shows that there's a displacement in the articular surface, and that is where you have an increase. So that's why I'm saying if you look backwards to what you're saying, yes, that's true. But I think what they need to do - and there's a friend of mine that's down in Tennessee who's on the board. And, you know, they can't put everything specifically in the guides, because if you look at the guides over the last 20 years, I don't know if I have it in this office, but they've gone from a book that big to that big.

Citing to the above testimony, Ross contends that Dr. Wagner agreed that a literal reading of the Guides would merit a three

percent permanent impairment rating as a result of the December 2003 injury. Ross believes that Dr. Wagner's assessment of a zero impairment rating was clearly contrary to the Guides.

As stated by Dr. Wagner, he believed that a three percent impairment rating was only authorized under the Guides if Ross suffered a nondisplaced healed fracture involving the articular surface of the patella. Dr. Wagner apparently reached this opinion by looking at the Guides a whole. In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 210 (Ky. 2003), our Supreme Court held that "the proper interpretation of the *Guides* and the proper assessment of an impairment rating are medical questions." We believe Dr. Wagner's opinion, that Ross suffered a zero impairment rating under the Guides, amounts to a simple interpretation of the Guides. As the interpretation of the Guides is properly a medical question, we cannot say the ALJ erred by relying upon Dr. Wagner's opinion that Ross suffered a zero impairment rating.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Jackson W. Watts
Bradly Slutskin
Versailles, Kentucky

BRIEF FOR APPELLEE THREAVE
MAIN STUD:

Walter A. Ward
Lori V. Daniel
CLARK & WARD, PLLC
Lexington, Kentucky