

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002577-WC

KROGER COMPANY #379

APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE
WORKERS' COMPENSATION BOARD
CLAIM NO. WC-05-01216

CHARLES S. ROBINSON; HON. JOHN
W. THACKER, ADMINISTRATIVE LAW
JUDGE; AND THE WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, MOORE AND THOMPSON, JUDGES.

MOORE, JUDGE: The Kroger Company #359 petitions for the review of a Workers' Compensation Board's decision reversing in part, vacating in part, and remanding an administrative law judge's opinion, order, and award of benefits to Charles S. Robinson. For the following reasons, we affirm the Board's decision.

In August 2004 Robinson sustained a work-related injury to his left knee. Prior to this injury, Robinson had not experienced problems with his knee. His injury did not respond to conservative treatment and in July 2005, Robinson underwent surgery for a torn meniscus in the left knee. Robinson continued to experience pain and his knee frequently "gave out" after the surgery.

Dr. Leonard Goddy testified after performing an independent medical evaluation. Dr. Goddy found no pre-existing active condition predating the work-related injury and opined that Robinson's injury aroused dormant arthritic changes to the left knee. Dr. Goddy assessed Robinson as having a 15% whole person impairment due to the knee injury. According to Dr. Goddy, Robinson could not return to the type of work he was performing when he was injured in August 2004.

Dr. Thomas M. Loeb also testified after conducting an independent medical evaluation of Robinson. Dr. Loeb noted that although Robinson never sought medical treatment for his knees prior to his August 2004 work injury, a bone scan predating the work-related injury evidenced pre-existing degenerative arthritis in Robinson's knees and shoulders. Dr. Loeb stated that Robinson's arthritis in his knee was not "caused or exacerbated by the injury at work. The [August 2004] cartilage tear was addressed with the [July 2005] arthroscopic procedure by Dr. Brown and I would have expected full recovery had he not had the underlying pre-existing osteoarthritis." Dr. Loeb assessed Robinson as having a 1% whole person impairment. Dr. Loeb did not assign an impairment rating for Robinson's arthritis because he did not attribute that condition to

the work-related injury. On cross-examination Dr. Loeb testified that if the arthritic condition was attributable to the work-related injury, then Robinson's overall impairment rating would be between 9% and 11%. He testified that Robinson's arthritis was "dormant in the sense that he was asymptomatic or at least there is no record of that. I think he had an active disease process that wasn't causing a significant amount of symptoms to carry him to the doctor for treatment." Dr. Loeb testified that Robinson could return to the type of work he performed in August 2004.

The ALJ found that Robinson sustained a work-related meniscus tear in his left knee that required surgery. The ALJ found that Robinson had a 1% permanent partial impairment due to the work-related injury and that his arthritis was not related to the work injury. Based on the 1% impairment rating, the ALJ determined that Robinson had a 0.65% permanent disability rating. The ALJ also found that Robinson was entitled to enhancement of his award by the 2-multiplier.

Robinson filed a petition for reconsideration before the ALJ, which was denied. Robinson appealed to the Board, asserting that the evidence compelled a finding that the arthritis in his knee was a pre-existing dormant condition brought into disabling reality by the work-related injury, that the ALJ erred in excluding the effects of his arthritis from his award, and that he was entitled to the 3-multiplier enhancement of his award. The Board reversed the ALJ's award based on a 1% impairment rating which excluded benefits for Robinson's arthritic condition in his knee, holding that the evidence compelled a finding that Robinson had a pre-existing dormant condition aroused into

disabling reality by the August 2004 work-related injury. The claim was remanded to the ALJ for entry of an award based on either Dr. Loeb's 9% to 11% impairment rating or Dr. Goddy's 15% impairment rating. The Board reversed the ALJ's decision on Robinson's petition for reconsideration, holding that the ALJ impermissibly reversed his decision on the merits. The Board affirmed the ALJ's application of the 2-multiplier. This petition for review by Kroger followed.

Kroger asserts that the Board substituted its findings for those of the ALJ. We disagree with Kroger's characterization of the Board's decision.

On reviewing the Board's decision, our function "is to correct the Board only where the [] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

The Kentucky Supreme Court held in *McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854, 859 (Ky. 2001), that "[w]here work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change; hence, the harmful change comes within the definition of an injury." Thus, the entire impairment of a work-related injury is compensable when it causes an underlying dormant condition to become symptomatic. The Supreme Court stated in *Roberts Bros. Coal Co. v. Robinson*, 113 S.W.3d 181, 183 (Ky. 2003), that "[i]mpairment and disability are not synonymous. . . . an

exclusion from a total disability award must be based upon pre-existing disability, while an exclusion from a partial disability award must be based upon pre-existing impairment." Awards for permanent partial disability are based on a worker's impairment.

While a claimant has the burden of proving the jurisdictional elements of his or her claim, *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979), the employer has the burden of proving the existence of a pre-existing, active condition. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984).

In the case before us, the Board explained as follows:

In the case *sub judice*, although it is undisputed that Robinson had pre-existing osteoarthritis that pre-dated his injury at Kroger, the record is devoid of any evidence indicating the condition was "active," as that legal term of art relates to KRS Chapter 342. It is well recognized that in cases involving permanent partial disability, in order to be characterized as "active" an underlying pre-existing condition must be symptomatic *and* impairment ratable pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury. *Roberts Brothers Coal v. Robinson*, 113 S.W.3d 181 (Ky. 2003). In this instance, neither Dr. Loeb nor Dr. Goddy assessed Robinson as having an impairment rating under the AMA Guides that pre-dated the subject work injury secondary to the pre-existing osteoarthritis in his left knee. . . . (Emphasis original; internal footnote omitted.)

As noted by the Board, Kroger had the burden of proving that Robinson's pre-existing osteoarthritis "was symptomatic *and* impairment ratable pursuant to the AMA *Guidelines* immediately prior to the occurrence of the work-related injury." See *Finley v. DBM Technologies*, 217 S.W.3d 261, 265 (Ky. App. 2007). Impairment rating is a medical question. *Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206 (Ky.

2003). Here, neither doctor testified that Robinson's pre-existing osteoarthritis merited an impairment rating; therefore, the entirety of Robinson's impairment due to his knee injury is compensable.

The decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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