

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-001302-WC

WILLAM BOXLEY, III

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKER'S COMPENSATION BOARD  
ACTION NO. WC-05-01842

PHILIP MORRIS; HON. JAMES L. KERR,  
ADMINISTRATIVE LAW JUDGE;  
WORKERS' COMPENSATION BOARD

APPELLEES

AND: NO. 2007-CA-001367-WC

PHILIP MORRIS

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION OF THE  
WORKERS' COMPENSATION BOARD  
ACTION NO. WC-05-01842

WILLIAM BOXLEY, III; HON. JAMES L.  
KERR, ADMINISTRATIVE LAW JUDGE;  
WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

OPINION  
AFFIRMING IN PART, REVERSING IN PART,  
AND REMANDING

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BEFORE: STUMBO AND WINE, JUDGES; GUIDUGLI,<sup>1</sup> SENIOR JUDGE.

WINE, JUDGE: This is a petition and cross-petition for review of a May 25, 2007, opinion by the Workers' Compensation Board (Board) affirming an opinion and award by the Administrative Law Judge (ALJ). In its cross-petition, the employer, Philip Morris, contends that the ALJ's finding that William Boxley, III, did not suffer an injury within the meaning of the Workers' Compensation Act precluded an award of temporary income and medical benefits. We note however, that the ALJ failed to make essential findings on whether Boxley's pre-existing condition was dormant or that it was aroused into disabling reality by his work activities. Without such findings, we are unable to conduct a meaningful review of the ALJ's award. However, we disagree with Boxley that the evidence compelled a finding that he suffered a permanent impairment from any arousal of his pre-existing condition. Hence, we affirm in part, reverse in part, and remand for additional factual findings.

Boxley began working for Philip Morris in 1972. In January 2005, Boxley operated a laser machine that perforated cigarette filter paper and he had to stack the ten to thirty pound rolls six to seven feet high. Boxley stated he had been performing this type of work for approximately two and a half months when, on January 10, 2005, he

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<sup>1</sup> Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

noticed pain and numbness in his fingertips, pain through his right arm and shoulder, and pain in the back of his neck. He stated he reported his symptoms to a company nurse and was sent to Occupational Physician Services where he was placed on light duty restrictions. Boxley stated he was later referred to Frazier Rehabilitation Institute where he was treated with traction and massage therapy. Boxley's family physician later referred him to Dr. Gregory B. Nazar, a neurosurgeon.

According to Boxley, Philip Morris would not accommodate his restrictions and he has not returned to work. Boxley stated that he was off work from January 10 through March 1, 2005, when he qualified for voluntary retirement. Boxley currently complains of shooting pains from his neck down his back and the inability to turn his head fully to the right.

In support of his claim, Boxley introduced the report of Dr. Leonard A. Goddy following an independent medical examination performed on March 16, 2006. Dr. Goddy diagnosed cervical disc disease at C4 through T1 and placed Boxley in a DRE cervical Category II, assigning a 7% impairment rating. He recommended lifting and carrying limitations in the fifteen to thirty-five pound range. Dr. Goddy concluded that Boxley was at maximum medical improvement and recommended continued use of home traction. On cross-examination, Philip Morris confronted Dr. Goddy with Boxley's 1998 medical records and diagnostic testing which revealed pre-existing cervical disc disease. Dr. Goddy modified his previously reported opinion and explained that 50% of Boxley's

impairment rating was due to his injury and 50% was due to the arousal of a pre-existing, dormant condition.

Dr. Robert Keisler examined Boxley on May 24, 2006, at the request of Philip Morris for the purpose of an independent medical evaluation. He diagnosed multi-level degenerative disc disease of the cervical spine, severe at C5-6, and a period of radiculopathy now resolved. However, Dr. Keisler did not believe Boxley's work activity produced any trauma to the cervical spine and the appearance of symptoms at work was a random event. Based on Boxley's 1998 medical records, Dr. Keisler stated that Boxley's symptoms and clinical findings could be explained by pre-existing degenerative changes in the cervical spine and he could expect recurrent episodes of cervical pain without any additional trauma. Since he found that Boxley's symptoms were not a work-related injury, Dr. Keisler declined to give an impairment rating. But when pressed for an impairment rating, Dr. Keisler agreed with the 7% impairment rating assessed by Dr. Goddy.

Philip Morris also introduced an October 27, 2005, letter report from Dr. Nazar, Boxley's treating neurosurgeon. After a follow-up evaluation, Dr. Nazar stated Boxley's "pain has been fully relieved" and "[h]e has responded nicely to conservative treatment options involving home cervical traction, physical therapy and anti-inflammatory support." Dr. Nazar noted Boxley was on no medications for his treatment, neurological examination was within normal limits, range of motion of the neck was

normal, and no radicular symptoms were present. Dr. Nazar stated he encouraged Boxley to engage in home exercise and conditioning program and follow-up was elective.

In his December 11, 2006, opinion and award, the ALJ noted the similarity of the testimony of the two evaluating physicians, Dr. Goddy and Dr. Keisler. However, the ALJ was not persuaded that Boxley had suffered a work-related injury within the meaning of the Act. In particular, the ALJ noted the opinion of Dr. Keisler that Boxley's work has had no effect upon his underlying cervical condition. The ALJ also focused on Dr. Nazar's report that, as of October 27, 2005, Boxley's pain had been fully relieved, his neurological examination was within normal limits, and his range of motion was normal.

But despite finding no injury within the meaning of the Act, the ALJ also found that Boxley was entitled to temporary total disability (TTD) benefits from February 2, 2005, through March 1, 2005, and medical expenses from January 28, 2005, through October 27, 2005. In making this award, the ALJ stated that Boxley's work caused a temporary exacerbation of his pre-existing degenerative cervical disc disease. But since Dr. Nazar found that Boxley's symptoms had resolved, the ALJ denied Boxley's request for future medical expenses.

Following the denial of cross-petitions for reconsideration, Boxley appealed and Philip Morris cross-appealed to the Board. Boxley argues the ALJ misinterpreted the medical evidence whether the pre-existing cervical disc disease was active. Since there was no evidence that he had any symptoms or received any treatment for the cervical disc disease prior to January 10, 2005, he asserted that his back condition was dormant and

asymptomatic until that date, and therefore remained compensable under the Act. He also argued that the evidence compelled a finding that he has a permanent impairment, and thus is entitled to an award of benefits including multipliers and medicals “for the entire cervical injury.” In its cross-appeal, Philip Morris argued the ALJ erred as a matter of law in awarding any benefits in light of his determination that Boxley’s symptoms do not constitute a harmful change.

The Board acknowledged that the ALJ made “inconsistent and seemingly irreconcilable findings.” However, the Board noted the ALJ’s explanation that he could award TTD benefits and medical benefits for work-related events even without a finding of permanent impairment. The Board further pointed out that the work-related arousal of a pre-existing dormant condition into disabling reality is compensable. *Finley v. DBM Technologies*, 217 S.W.3d 261, 265 (Ky.App. 2007). Thus, while Boxley’s symptoms did not constitute an injury under the Act, he was entitled to TTD benefits and medical expenses related to the temporary exacerbation of his non-work-related cervical degenerative disc disease. On the other hand, the Board also found that there was substantial evidence to support the ALJ’s conclusion that Boxley had only sustained a temporary flare-up of his symptoms. Consequently, the Board concluded that he was not entitled to income benefits beyond March 2005 or to future medical expenses.

In their petitions and cross-petitions for review, Boxley and Philip Morris raise the same issues they presented to the Board. Where the party with the burden of proof is not successful before the ALJ, the issue on appeal is whether the decision was

unreasonable because the overwhelming evidence favored that party. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). On factual matters, the ALJ has the sole discretion to determine the quality, character, and substance of the evidence and an ALJ 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. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985); *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). In this case, however, the ALJ failed to make sufficient findings on issues which are essential to the appeal. Consequently, we are unable to determine whether the ALJ's application of law was clearly erroneous.

The ALJ and the Board first focused on KRS 342.0011(1), which defines an "injury" in pertinent part, as

any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. "Injury" does not include the effects of the natural aging process, and does not include any communicable disease unless the risk of contracting the disease is increased by the nature of the employment.

As the Board correctly noted, the term "injury" refers to the traumatic event or series of traumatic events that causes an injury rather than to the harmful change itself. *See Lexington-Fayette Urban County Government v. West*, 52 S.W.3d 564, 566 (Ky. 2001). In other words, a "physical injury" is an event that involves physical trauma and

proximately causes a harmful change in the human organism evidenced by objective medical findings. However, the ALJ failed to adequately distinguish between an injury which causes a harmful change in the human organism and one which arouses a pre-existing condition into disabling reality.

The parties agree that Boxley was first diagnosed with degenerative disc disease in 1998 when he was treated following a non-work-related altercation. The ALJ relied heavily on Dr. Keisler's opinion that Boxley's symptoms were not related to his work activities, but were entirely caused by the pre-existing degenerative changes in the cervical spine. Since Boxley's symptoms did not arise out of the course of his employment and were caused by the effects of the natural aging process, Dr. Keisler concluded that his condition was not an injury within the meaning of the Act.

But despite finding that Boxley had not suffered an injury, the ALJ went on to find that Boxley's work "caused a temporary exacerbation of [his] pre-existing degenerative disease of the cervical spine." Therefore, the ALJ concluded that Boxley was entitled to TTD benefits. Since the ALJ agreed with Dr. Keisler's opinion, Philip Morris contends that these findings are contradictory and mutually exclusive.

As noted above, the Board observed that the work-related arousal of a pre-existing dormant condition into disabling reality is compensable. *Finley v. DBM Technologies*, 217 S.W.3d at 265. The Board also noted that it is possible for an injured worker to establish a temporary injury for which TTD and temporary medical benefits may be paid, but fail to establish a permanent harmful change to the human organism for

which permanent benefits are payable. *Robertson v. United Parcel Service*, 64 S.W.3d 284 (Ky. 2001). Thus, the Board interpreted the ALJ's findings as holding that "Boxley's work caused nothing more than a temporary exacerbation of his preexisting, non work-related cervical degenerative disc disease." Given this interpretation, the Board concluded that Boxley was entitled to temporary income and medical benefits for the period the symptoms were aroused into disabling reality, but not to permanent income benefits or future medical expenses.

In *Finley*, the Kentucky Supreme Court discussed the standards for determining that a pre-existing condition is dormant or active, or that the arousal of an underlying pre-existing condition is temporary or permanent:

To be characterized as active, an underlying pre-existing condition must be symptomatic *and* impairment ratable pursuant to the AMA *Guidelines* immediately prior to the occurrence of the work-related injury. Moreover, the burden of proving the existence of a pre-existing condition falls upon the employer. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky.App. 1984).

Alternatively, where the underlying pre-existing disease or condition is shown to have been asymptomatic immediately prior to the work-related traumatic event *and* all of the employee's permanent impairment is medically determined to have arisen after that event – due either to the effects of the trauma directly or secondary to medical treatment necessary to address previously nonexistent symptoms attributable to an underlying condition exacerbated by the event – then as a matter of law the underlying condition must be viewed as previously dormant and aroused into disabling reality by the injury. Under such circumstances, the injured employee must be

compensated not just for the immediate physical harm acutely produced by the work-related trauma, but also for all proximate chronic effects corresponding to any contributing pre-existing condition, including any previously dormant problem strictly attributable solely to congenital or natural aging processes, as it relates to the whole of her functional impairment and subsequent disability rating, including medical care that is reasonable and necessary pursuant to KRS 342.020.

The arousal of a pre-existing dormant condition into disabling reality may be considered temporary when, upon attaining maximum medical improvement, the employee post injury fully recovers and reverts to her pre-injury state of health. However, where the trauma *or* the underlying pre-existing defect exacerbated by the trauma results in a permanent impairment rating post injury, even though secondary to surgery or other medical treatment, the totality of the effects of the employee's condition must be judged compensable as a matter of law.

To summarize, a pre-existing condition that is both asymptomatic and produces no impairment prior to the work-related injury constitutes a pre-existing dormant condition. When a pre-existing dormant condition is aroused into disabling reality by a work-related injury, any impairment or medical expense related solely to the pre-existing condition is compensable. A pre-existing condition may be either temporarily or permanently aroused. If the pre-existing condition completely reverts to its pre-injury dormant state, the arousal is considered temporary. If the pre-existing condition does not completely revert to its pre-injury dormant state, the arousal is considered permanent, rather than temporary. . . .

*Finley*, 217 S.W.3d at 265. *See also McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854, 859 (Ky. 2001).

Philip Morris points out that Dr. Keisler was of the opinion that Boxley's work had no effect on the appearance of his symptoms in January 2005. And based on the 1998 medical records, Dr. Keisler refused to say that the cervical disc disease was dormant or asymptomatic. Since the ALJ stated that he was relying on Dr. Keisler's testimony, Philip Morris contends that the ALJ could not have found that Boxley's cervical disc disease was dormant prior to January 2005, or that it was aroused into disabling reality by Boxley's work activities. Consequently, Philip Morris contends that the ALJ clearly erred in awarding even temporary income and medical benefits.

The ALJ's findings are not sufficient to make a clear determination on this issue either way. Dr. Keisler testified that once the cervical disc disease was detected in 1998, it could no longer be characterized as dormant. He was of the opinion that, while the symptoms may be dormant or fail to reach a threshold when a patient would seek treatment, the underlying cervical disc disease was always active. Boxley points out that there was no evidence that he ever sought or received treatment for the cervical disc disease until January 2005. Similarly, there was no evidence that he had experienced any symptoms in his hands, arms, shoulder or neck prior to January 2005. However, the ALJ never addressed whether Boxley's cervical disc disease was dormant or asymptomatic prior to that date.

Furthermore, the ALJ's findings as to the work-relatedness of the symptoms are contradictory. In paragraph 13 of the opinion and award, the ALJ stated that the evidence supported Dr. Keisler's opinion that Boxley's work had no effect upon

his underlying cervical condition. But in paragraph 15, the ALJ suggests that the appearance of Boxley's symptoms was caused by his work. And in the order denying the petition for reconsideration, the ALJ again makes this suggestion, stating that "it is possible to award temporary total disability benefits . . . *for work related events* which did not result in a permanent award." (*Emphasis added*).

Unlike the Board, we are unable to reconcile these findings. As the Board correctly noted, a pre-existing condition may be either temporarily or permanently aroused into disabling reality. But to be compensable, a pre-existing condition must be both dormant and aroused into disabling reality by a work-related injury. The ALJ failed to make either essential finding one way or the other. And while it may be possible to infer the first finding, the ALJ made contradictory statements concerning whether Boxley's work caused the condition to be aroused into disabling reality. Without a clear finding on these issues, we are unable to conduct a meaningful appellate review.

Therefore, this matter must be remanded to the ALJ with directions to make additional findings on these issues. The ALJ clearly found that Boxley did not incur an injury within the meaning of the Act. Similarly, the ALJ also found that Boxley's symptoms were caused by his pre-existing cervical disc disease. However, the ALJ must first determine whether the cervical disc disease was dormant prior to January 2005. While Dr. Keisler took the position that the condition has been active since 1998, he did not base this conclusion on Boxley's medical records. Rather, he took a general position that such a condition is always active once it is identifiable in diagnostic testing. While

his opinion on this matter could support a finding that the condition was active, there was no evidence that Boxley experienced any symptoms or received any treatment for the condition prior to January 2005. As there was evidence to support a finding that the condition was either dormant or active, such a determination is within the exclusive province of the finder of fact.

Upon finding that the condition was dormant, the ALJ must then determine whether it was aroused into disabling reality by work-related events. Although Dr. Keisler was of the opinion that the appearance of symptoms bore no relation to Boxley's work activities, he conceded that stressful physical activities increase the symptoms while they are being performed. If the ALJ finds that the condition was asymptomatic prior to January 2005, the ALJ could reasonably conclude that the condition was aroused into disabling reality by Boxley's work activities. But given the conflicting evidence, the ALJ must make this finding.

In his direct appeal, Boxley argues that the ALJ erred in finding that he suffered no more than a temporary exacerbation of his pre-existing, non-work-related cervical disc disease. He maintains that the condition was asymptomatic prior to January 2005, but now has permanent restrictions and limitations. Since he has failed to return to his pre-injury state of health, Boxley contends that the arousal of the pre-existing condition must be deemed permanent.

However, the ALJ made a specific finding on this issue. Both Dr. Keisler and Dr. Nazar testified that Boxley's symptoms had fully resolved as of October 27,

2005. While Boxley introduced contrary evidence, we agree with the Board that the evidence did not compel a finding that the arousal was permanent. Therefore, assuming that the ALJ finds the condition to be compensable, the ALJ did not clearly err in finding that Boxley was only entitled to temporary income and medical benefits. Likewise, since the ALJ found that Boxley's cervical disc disease was only temporarily aroused, the ALJ did not err in declining to assess a permanent impairment rating or to award benefits for the entire neck condition.

Accordingly, the May 25, 2007, opinion of the Workers' Compensation Board is affirmed in part, reversed in part, and remanded for additional factual findings and an opinion as set forth herein.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-  
APPELLEE:

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BRIEF FOR APPELLEE/CROSS-  
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