

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002398-WC

QUALITY DISTRIBUTION, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-88007

JAMES R. HILL;
HONORABLE MARCEL SMITH, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; KNOPF,¹ SENIOR JUDGE.

DIXON, JUDGE: Quality Distribution, Inc. ("Quality") seeks review of a decision of the Workers' Compensation Board affirming an ALJ's award of benefits to Quality's former employee, James R. Hill ("Hill"). We affirm.

¹ Senior Judge William L. Knopf, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Hill, age 55, has a high school education and no vocational training. On March 29, 2003, while working for Quality, Hill injured his neck and shoulder. Hill was dragging a large industrial hose when he felt his neck "pop." He was diagnosed with a central disc herniation and had a cervical discectomy with fusion at level C5-6. Thereafter, he had shoulder surgery with excision of the distal clavicle. Hill's medical history was significant for a prior cervical fusion at C6-7 in 1996, due to a non-work related injury.

The parties tendered minimal medical evidence to the ALJ. Hill submitted the medical report of his treating physician, Dr. Theodore Davies. Dr. Davies, a neurosurgeon, performed both of Hill's fusion surgeries. Hill also submitted the report of Dr. William Stodghill, an orthopedic surgeon who performed the shoulder surgery. Quality submitted the independent medical examination of Dr. John Kelly and tendered a report from Dr. Stodghill.

Dr. Davies assessed a 25% whole person impairment for Hill's 2003 neck injury. Dr. Davies also stated that Hill had pre-existing cervical disc degeneration and attributed 50% of his impairment to the pre-existing dormant condition.

Dr. Kelly assessed a 26% whole person impairment for Hill's cervical injury and a 10% impairment for Hill's shoulder injury. The report stated, in pertinent part:

Using the combined values table, the combined whole person permanent partial impairment for injuries sustained by Mr.

Hill on March 27, 2003 is 34%. This is solely due to the work injury. In fact, Mr. Hill was performing heavy physical labor for this employer for approximately a year before this injury occurred.

It should be noted that Mr. Hill had a pre-existing condition, a C6-7 disc herniation for which he underwent an ACDF in 1996 with a successful outcome. Per the 5th edition AMA Guides to the Evaluation of Permanent Impairment, in spite of his excellent outcome, his impairment rating for that injury would have been DRE cervical category IV, which would have equated to 25% whole person impairment.

At the hearing, Hill testified that he fully recovered from the 1996 surgery and was asymptomatic until the work injury in 2003. The ALJ rendered an opinion on March 21, 2007. The ALJ, relying on Dr. Kelly's report, found Hill had a 34% whole person impairment and awarded permanent partial disability benefits. In its petition for reconsideration, Quality argued the ALJ was obligated to reduce Hill's cervical impairment by 25%. The ALJ denied Quality's petition for reconsideration, and Quality appealed to the Board. The Board subsequently affirmed the ALJ's award, and this petition for review followed.

When this Court reviews a decision of the Board, our function "is to correct the Board only where [we] perceive[] 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 Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky.1992).

Quality relies on Kentucky Revised Statutes (KRS) 342.730(1)(e). The statute states in part: "For permanent partial disability, impairment for nonwork-related disabilities . . . shall not be considered in determining the extent of disability or duration of benefits under this chapter." While the statute is clear, the evidence does not support Quality's argument for a reduction in impairment.

To calculate permanent partial disability benefits, the ALJ must select a permanent impairment rating calculated pursuant to the latest edition of the *AMA Guides*. KRS 342.730(1)(b). "The proper interpretation of the Guides and the proper assessment of an impairment rating are medical questions." *Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206, 210 (Ky. 2003).

Relying on *Caldwell Tanks v. Roark*, 104 S.W.3d 753 (Ky. 2003), Quality contends the ALJ was obligated to consult the *Guides* and subtract the pre-existing impairment from the cervical impairment attributed to the work injury.

We find Quality's reliance on *Roark* misplaced. *Roark* requires an ALJ to consult a specific conversion chart in the *Guides* to convert a binaural hearing impairment into an AMA impairment if the medical expert failed to do so. *Id.* at 757. Aside from obvious factual differences between *Roark* and the case *sub judice*, we must emphasize that there was no evidence Dr. Kelly failed to reduce Hill's impairment. Rather, Dr.

Kelly's report clearly acknowledged two discrete cervical injuries.

Quality correctly points out that the *Guides* advise apportioning a pre-existing impairment by subtracting it from the new injury's impairment rating. However, while Dr. Kelly assessed a prior impairment rating pursuant to the *Guides*, he did not suggest that the pre-existing impairment contributed to the 34% combined impairment rating, nor did he apportion the pre-existing injury to reach an ultimate impairment value.

Quality bore the burden of proving that the pre-existing cervical impairment was non-compensable. *Finley v. DBM Technologies*, 217 S.W.3d 261, 265 (Ky. App. 2007). We reiterate that Quality merely submitted medical reports and did not depose the physicians or offer live testimony.

"The [ALJ], as the finder of fact, and not the reviewing court, has the authority to determine the quality, character and substance of the evidence presented" *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). Furthermore, the ALJ is free "to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof." *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). Certainly Dr. Kelly's assessment of a 34% impairment "solely" due to the work accident, coupled with Hill's own testimony that he was asymptomatic for seven years prior to the work injury, constituted substantial evidence

supporting the ALJ's decision. In light of the medical evidence presented, it was reasonable for the ALJ to conclude that Hill's pre-existing condition did not warrant a reduction in his ultimate impairment rating. After thoroughly reviewing the record before us, we conclude the Board properly affirmed the ALJ's award.

For the reasons stated herein, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEES

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