COMMONWEALTH OF KENTUCKY
SUPREME COURT
C.A. NO.:
COURT OF APPEALS CA NO: 2007-000654-WC
WCB NO. 04-68919

ANDREA SUE SWEENEY **APPELLANT**

VS. **APPEAL FROM COURT OF APPEALS**

KING'S DAUGHTERS MEDICAL CENTER
HON. GRANT S. ROARK, ALJ AND
WORKERS' COMPENSATION BOARD **APPELLEE**

****

I hereby certify that a true and correct copy of the Brief of Appellant has been served on the parties hereto by mailing same, postage prepaid; to: Clerk of the Kentucky Supreme Court Kentucky Supreme Court, Room235 Capitol Bldg 700 Capitol Avenue, Frankfort, KY 40601-3415 , Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. William Emrick, Commissioner, Department of Workers' Claims, Workers' Compensation Board, Prevention Park, 657 Chamberlin Avenue, Frankfort, KY 40601; A. Stuart Bennett, Esq., P.O. Box 2150, Lexington, Kentucky 40588; Hon. Grant S. Roark, Administrative Law Judge, 410 West Chestnut Street, 7th Floor, Louisville, Kentucky 40202.

Dated this the 21 day of December, 2007

G. C. Perry III

G.C. PERRY, III
PERRY & MILLER
P.O. BOX 900
PAINTSVILLE, KY 41240
(606) 789-5395

MAY IT PLEASE THIS HONORABLE COURT

Notice is given that the Appellant, Andrea Sweeney, hereby appeals the decision of the Court of Appeals Opinion dated October 26, 2007

1. Appellant, Andrea Sweeney, is represented by G. C. Perry, III, PO Box 900, 232 College Street, Paintsville, Kentucky 41240.

2. Appellee, King's Daughters' Medical Center, is represented by A. Stewart Bennett, Jackson Kelly, PLLC, PO Box 2150, Lexington, Kentucky, 40588-9945.

3. Appellee, Hon. Grant S. Roark, Administrative Law Judge, 410 West Chestnut Street, Seventh Floor, Louisville, Kentucky, 40202.

4. Appellee, Workers' Compensation Board, Hon. William Emrick, Commissioner, Department of Workers' Claims, 657 Chamberlin Avenue, Frankfort, Kentucky 40601.

5. There is no other pending litigation or decisions in this case, besides the appeal here from the Court of Appeals . This notice of appeal was timely filed. No benefits have been paid to the Petitioner from the Respondent during the pendency of this claim. There are no other matters remaining in litigation between the parties

INTRODUCTION

This is an injury case wherein the Administrative Law Judge found that the Petitioner's injuries were not as a result of her accident occurring on September 23, 2004, the Workers' Comp Board Affirmed, March 2, 2007. The Court of Appeals affirmed, with a strong concurring opinion by Senior Judge John W. Graves.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Procedural

The Petitioner filed a claim on March 22, 2006 alleging a work related injury occurring on September 23, 2004. The case proceeded to hearing, which was held on August 17, 2006. The Administrative Law Judge's Opinion and Order was entered on October 16, 2006. A Petition for Reconsideration was filed on October 21, 2006 and an Order on Petition for Reconsideration was entered on November 15, 2006. The Workers' Compensation Board affirmed the ALJ's decision on March 2, 2007. The Court of Appeals affirmed in a 2-1 decision entered November 26, 2007. We appeal that decision.

Facts

Andrea S. Sweeney has been continuously employed since 1970. In 1995, she began working in Ashland, Kentucky at King's Daughters Medical Center as an operating room (OR) nurse. In 2002, Mrs. Sweeney underwent cervical spine surgery. Her operating doctor, Dr. Powell, stated that the surgery was a success and shortly after he released her to go back to work full time and unrestricted. She continued to work unrestricted and without troubles until the accident in question here.

On September 23, 2004, Mrs. Sweeney was assisting a very busy orthopedic surgeon, Dr. Touma, with an anesthetized patient whose weight was about two hundred and fifty pounds. Dr. Touma grabbed the patient's leg and Mrs. Sweeney grabbed the other leg so the patient would not suffer in being repositioned, as was a normal routine. While trying to adjust the patient, she felt a strong pop in her neck and her pain and troubles started. She immediately advised her employer.

She was sent to King's Daughters' own occupational medicine facility in the hospital complex where she was treated for several days and then referred to Dr. James Powell, a neurosurgeon. She was then sent to Premier Physical Therapy and eventually to J. Boyer, D.O., neurosurgeon at King's Daughters. She was also treated by Dr. Bell, a pain specialist/rehab doctor.

The last day that she was able to work was September 30, 2004 at which time she was suffering from multiple mini traumas in the workplace which included her wrists (carpal tunnel), elbows (ulnar nerve) and back. She had worked a week of light work after the incident until the hospital sent her home because the hospital's rehab doctor said the limited duty included too much neck movement. The employer voluntarily paid her

Workers' Compensation benefits for this accident up to August 28, 2005, but discontinued the payments stating that the injury was an existing injury.

She has had every kind of treatment imaginable for the neck injury/pop that occurred on the date of this accident. She has headaches and was treated for her multiple mini traumas to multiple parts of her body. In her initial evaluation on April 25, 2006, the diagnosis was that she had a secondary disc rupture of the cervical spine. The ruptures lie either above or below a previously fused segment – the segment that was operated on in 2002 and fully recovered from. However, the accuracy of the diagnoses was compromised due to artifacts from the metallic hardware placed at the time of her cervical disc surgery in December of 2002. Dr. Herr's initial report is filed as Exhibit one to the Defendant's deposition taken of him but he filed various supplemental reports including 107-I's which were placed in the record by the Appellant in which he points out the injury in dispute here as a new disc.

EVALUATING DOCTORS, BEST AND SHERIDAN

The Defendant, Appellee, chose Dr. Michael Best as one of their examiners. Even though Dr. Best opined that there had been no significant change since the surgery in 2002, he opined that this was a new injury to the neck after being released after the 2002 surgery to unrestricted work.

(Appx. Pg. 51-53). He also noted a bulging disc at C4-5, a different spot than the prior surgery centered on, which was C5-6. (Appx. Pg. 68-69).[1]

The second examiner chosen by the Appellee was Richard Sheridan, M.D. of Sheridan Evaluation Services, Inc., Cincinnati, Ohio. Dr. Sheridan has no hospital privileges and has not been in an operating room in approximately fifteen years, confining himself to IMEs for Defendants. However, he is emphatic that Mrs. Sweeney now has cervical disc above or below prior surgery.

Following the 2004 injury, all of the physicians who saw her and claimed she did not have a new injury seemed to be from the staff of King's Daughters Hospital and none of them wanted to take the responsibility of totaling the Appellant out or helping her towards that means, **but it is important to note that none of them could cure her either.**

DR. JASON RICE

[1] Interesting to note, Dr. Best was at one time an orthopedic surgeon, but he has been blind for ten years or more in one eye and has not been in an operating room during that time for obvious reasons. He testified that he had not done any surgery in that length of time and was not anticipating doing any. He confines himself to speaking to Chamber of Commerce Groups and generally to advocating for employer groups. The rest of his time he spends doing IMEs for Defendants. His testimony could best be characterized as unbelievable and he seemed to be somewhat of a professional witness who when it was time to be cross examined, couldn't understand any of the questions asked by opposing counsel.

Dr. Jason Rice, by an 107-I, indicates that Mrs. Sweeney has a anterior cervical fusion at C5-6 that was done on December 6, 2002 but now has a herniated cervical disc at C4-5 and attributes this to this accident saying that Mrs. Sweeney has 15% partial permanent disability according to the AMA Guides. (See Deposition of Dr. Rice pages 19-21, 24-25). He also states that Mr. Sweeney had no active disability prior to this injury and that the she does not retain the physical capacity to return to the type of work performed at the time of her injury.

DR. DAVID HERR

Dr. Herr also filed a 107-I in which he placed Mrs. Sweeney's impairment at 28%, citing to AMA Chapter 15, Table 15.6. (See Deposition of Dr. Herr pages 27-28). He states that she had no active disability prior to the injury concerned with here and that she does not retain the physical capacity to return to the type of work performed at the time of the injury. (See deposition of Dr. Herr, generally). There was a handwritten 107-I also filed in the record that says that she was lifting a 250 pound patient on 09/23/04, which caused her injury to C4-5, a different injury than the prior surgery corrected. (See deposition of Dr. Herr page 9). He filed multiple reports in the record including one attached to his deposition. (See deposition of Dr. Herr, Exhibit 1).

DR. JAMES POWELL

On May 10, 2006, Dr. Powell says that Mrs. Sweeney's assessment is secondary to work injury and that he recommends permanent disability for the patient. "She is unable to return to nursing duty with lifting. She is unable to return to the occupation of nursing with prolong chart work because of neck pain and recommend permanent retirement." (Appx. Pg. 44-45).

DR. BELL

Dr. Bell is a Board Certified in physical medicine and rehabilitation and is also connected with King's Daughters Hospital. He gave Mrs. Sweeney various injections in the facility and he says at the bottom of page two of his work up of 07/11/06 that he is in support of this patient's disability application and that it is his opinion Mrs. Sweeney is totally and permanently disabled from her current occupation and from any occupations for which she is qualified by means of education, training or experience.

ANDREA SWEENEY

At the hearing the appellant indicated that she was making $26.00 per hour. She indicated she was committed to nursing and her job and that it was her life. She indicates that after she had been off a month because

she was unable to return to work, she received a letter from her employer terminating her, although she had worked for them approximately ten years and had no attendance problems. She indicated in support of her motion to require the Defendant to authorize a myelogram and CAT Scan to be done simultaneously in accordance with the recommendations of Dr. Herr to locate the exact level of the ruptured disc diagnosed by Dr. Sheridan, the Defendant's initial examiner.

She testified that she paid for short term disability insurance but she drew none of that as the employer was paying her compensation. She testified that the employer paid long term disability premium but did not pay her any of that. If they paid anything, which is unclear, they wanted their money back as soon as she got a Workers' Compensation award.

REVIEW STANDARD

When appealing a Board's decision to this Honorable Court, "[t]he standard of review is 'to correct the Board only where it has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause injustice.'" W. Baptist Hosp. v. Kelly, 827 S.W.2d 685, 687-88 (Ky.1992). When a claimant is unsuccessful below, the issue on appeal is "whether the evidence was so overwhelming upon consideration of the entire record, as to have

compelled a finding in his favor." Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky. App. 1984). The applicant further has a matter of right appeal of the Court of Appeals decision to the Kentucky Supreme Court. CR 76.25 (12). "The ALJ and Board's application of the law are reviewed de novo." Hardy Burlingham Min. Co. v. Hurt, 238 Ky. 589, 282 S.W.2d 817 (1931).

ARGUMENT

I. Misconstruing the law of pre-existing injury

The law is clear that the work-related arousal of a pre-existing dormant condition into disabling reality is compensable. McNutt Constr./First Gen. Servs. V. Scott, 40 S.W.3d 854 (Ky. 2001). "When a preexisting dormant condition that was permanently aroused into a disabling reality by a work-related injury, and thus, caused permanent impairment or medical expense as a result of such arousal, is compensable." Finley v DBM Technologies, 2007 WL 188128 (Ky. App. 2007)(disposition not final, but set for publication); See also, McNutt Constr./First Gen. Servs., *supra.*. If the injury was a direct result of the work activities, as a matter of law, the underlying condition must be viewed as previously dormant and aroused into disabling reality by the injury. See Ingersoll-Rand v. Edwards , 28 S.W.3d 867 (Ky. 2000). "'*Injury*' means any work related traumatic event or

series of traumatic events that arise 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." Id. at 868 (*citing* KRS 432.0011(1)). "[T]he burden of proving the existence of a preexisting condition falls upon the employer." Finley, at 3 (*citing* Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky.App.1984)).

As extensively explained in the facts section preceding the argument, Mrs. Sweeney had an operation in December of 2002. After three months of recovery, which would be around March of 2003, Mrs. Sweeny went back to work as a nurse unrestricted and performing all duties. She stopped seeking medical attention after the surgery, and the surgical doctor stated that she had a full recovery and the procedure was 100% effective. Over a year and a half later, the injury in question occurred. The debilitating pain began, medical treatment was pursued, and she was unable to work because of the injury.

The Workers' Compensation Board mainly reviewed the statements of the doctors and came to the conclusion that this injury was no different than her prior injury. However, the prior injury had been completely eliminated after the surgery that was performed in 2002. Therefore, the current injury is not an old injury, but a new injury - one that lay dormant until an episode

brings it back to life, as in the Finely case and others. Mrs. Sweeney had worked without restraint until the incident of moving a 250 lb man on a hospital bed. Now, she is unable to work, not even light work, because the constant movement of the neck, such as looking down at files, will cause even more injury to her already problem area.

Therefore, since the injury did not arise, and was in fact caused by a "work related" incident, the Workers' Compensation Board was erroneous when it ruled in accordance with the ALJ and affirmed its denial of benefits to Mrs. Sweeney.

II. Misapplication of the standard of review – there was not substantial evidence for the decision of the ALJ

The ALJ's ultimate conclusions must be supported by evidence of substance. See Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). "Substantial evidence is defined as evidence of relevant consequence, having fitness to induce conviction in the minds of reasonable people." Smyzer v. B.F. Goodrich Chem. Co., 474 S.W.2d 367, 369 (Ky. 1971). "To be compelling, the evidence [for the Appellant] must be so overwhelming that no reasonable person can reach the same conclusion as the Administrative Law Judge. Daniel vs. Arco Steel Company, LP, 913 S.W.2d 797, 800 (Ky. App. 1995). The evidence here is just that – so

overwhelming that no reasonable person could have reached the same decision as the ALJ.

The ALJ relied primarily on two doctor's opinions, the two doctors that have the least experience with these types of problems and the ones that had the least interaction with Mrs. Sweeney. Because of this, Mrs. Sweeney argues the ALJ's conclusion could not have been reached by a reasonable person and should therefore be reversed.

Dr. Powell stated in a letter which was made part of the evidence, that Mrs. Sweeney's recovery from her 2002 surgery was complete and that she was allowed to work without any restrictions, because she had no limitations. The facts support that because she had worked approximately two years between the time of that surgery and this accident without any difficulty.

Dr. Bell, a rehabilitation doctor on the staff of the Appellee favored disability. Dr. Bell treated Mrs. Sweeney extensively and opined in his report that he **endorses her disability, and premises it upon the incident in question here** -speaking of course of the injury that occurred in the operating room while lifting a patient.

Additionally, Dr. Herr opined that Mrs. Sweeney has a rupture intervertebrial disc in her neck at a different level than the level cured from

the previous surgery. He further acknowledged Mrs. Sweeney had a 28% impairment. He explained that since she was released to return to work without restrictions after the fusion surgery, he considered her fully recovered and therefore, the 28% impairment arose from the incident in the operating room. Dr. Rice came to the same conclusion. Dr. Rice further stated that **she did not have an active impairment prior to the injury,** but now she should be restricted in lifting, bending, climbing, reaching and grasping and further that she does not retain the physical capacity to return to her former work.

Finally, Dr. Powell stated that he recommended permanent disability for Mrs. Sweeney in as much as Sweeney would be unable to return to nursing duty with lifting, and also because of neck pain, she would be unable to return to the occupation of nursing with prolonged chart work.. He also opined that she had elements of cervical radiculopathy. He recommended permanent retirement.

However, the ALJ discredited the substantial evidence without good reason and relied primarily on the Appellee's two hired guns, Dr. Richard T. Sheridan[2] and Dr. Michael Best[3]. He states that he his most persuaded by

[2] who has not had ***any*** hospital privileges for about fifteen years and runs an evaluation service traveling throughout several states performing medical examinations for Defendants

these doctors in that this injury was pre-existing, even though the overwhelming evidence that the prior surgery was a complete success.

The substantial evidence in this case weighed in favor of the Appellant. The overwhelming evidence in this case is that Mrs. Sweeney, the Appellant, suffered an injury in 2004 that caused her to become disabled and unable to work.

III. Kentucky should follow federal precedent and apply the treating doctor's rule to workers' compensation cases

In its decision, the Court of Appeals correctly asserts that Kentucky does not give more weight to the evidence of the attending physician than to the evidence of the others, *citing* Wells v. Morris, 698 S.W.2d 321, 322 (Ky. App. 1985), as authority. Further, asserted is that the "ALJ has the sole authority to judge the weight, credibility and inference to be drawn from the record." Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329, 321 (Ky. 1997). However, we assert to this most honorable Court, that it is now time to follow the precedent of the federal courts by adopting their reasoning in regards to the weight given to the testimony and reports of treating physicians in workers' compensation cases.

[3] who testified that he had not been in an operating room for eight to ten years and has only one eye to examine x-rays and medical records.

The Honorable Senior Judge, Former Justice, John W. Graves, states it best in his concurring opinion:

> I concur with the result solely because I am bound to follow precedent. However, I write separately to point out the irrational conclusion that our case law allows to an ALJ. As Justice Palmore has stated, common sense should not be a stranger to the law.
>
> The time is long overdue for our courts to adopt the well reasoned opinions of the Sixth Circuit concerning the relative weight to be given to testimony of treating and examining physicians respectively.
>
> The United States Court of Appeals for the Sixth Circuit has repeatedly held that the opinions of a treating physician are entitled to great weight and generally are entitled to greater weight than the contrary opinions of a consulting physician who has examined the claimant on only a single occasion. *Farris v. Sec'y of Health and Human Services*, 773 F.2d 85, 90 (6th Cir. 1985); *Harris v. Heckler*, 756 F.2d 431, 435 (6th Cir. 1985); *Hurst v. Schweiker*, 725 F.2d 53, 55 (6th Cir. 1984); *Stamper v. Harris*, 650 F.2d 108, 111 (6th Cir. 1981); *Branham v. Gardner*, 383 F.2d 614, 634 (6th Cir. 1967).
>
> In *Walker v. Sec'y of Health and Human Services*, 980 F.2d 1066, 1070 (6th Cir. 1992), the court held:
>
> The medical opinion of the treating physician is to be given substantial deference—and, if that opinion is not contradicted, complete deference must be given. The reason for such a rule is clear. The treating physician has had a greater opportunity to examine and observe the patient. Further, as a result of his duty to cure the patient, the treating physician is generally more familiar with the patient's condition than are other physicians. It is true, however, that the ultimate decision of disability rests with the administrative law judge.
>
> (Citations omitted.)
>
> On two occasions, the court has described the rule as favoring the opinion of a treating physician over the opinion of a physician who has been hired by the government for the purpose of defending against a disability claim. *Hurst v. Sec'y*

> *of Health and Human Services*, 753 F.2d 517, 520 (6th Cir. 1985); *Allen v. Califano*, 613 F.2d 139, 145 (6th Cir. 1980).
> The court has held that the uncontradicted opinion of a treating physician is entitled to complete deference. *Cohen v. Sec'y of Dep't of Health and Human Services*, 964 F.2d 524, 528 (6th Cir. 1992); *Jones v. Sec'y, Health and Human Services*, 945 F.2d 1365, 1370 n.7 (6th Cir. 1991); *Shelman v. Heckler*, 821 F.2d 316, 320 (6th Cir. 1987).
> Reliance upon the opinion of a treating physician over the contrary opinion of a consulting physician is particularly appropriate where the severity of a claimant's impairment fluctuates over time. *Lashley v. Sec'y of Health and Human Services*, 708 F.2d 1048, 1054 (6th Cir. 1983).
> If the Secretary rejects the opinion of a treating physician, he must articulate a reason for doing so. *Shelman*, 821 F.2d at 321.

"It is true that the opinion of a non-examining physician is entitled to little weight if it is contrary to the opinion of the claimant's treating physicians. Shelman v. Heckler, 821 F.2d 316, 321 (6th Cir. 1987). However, the treating physicians opinion is entitled to controlling weight [ ] when the medical opinion is [consistent] with the other substantial evidence in the record. Walters v. Comm'r of Social Security, 127 F.3d 525, 530 (6th Cir. 1997)." Wilson v. Halter, 23 Fed.Appx. 341, (6th Cir. 2001). "For instance, a highly qualified treating physician who has lengthy experience with a [claimant] may deserve tremendous deference, whereas a treating physician without the right pulmonary certifications should have his opinions appropriately discounted." Eastover Mining Co. v. Williams, 338 F.3d 501 (6th Cir. 2003).

This case is an example of how the opinions of less qualified physicians were not "appropriately discounted" and relied upon in the ALJ's decision. "The above opinions are deserving of emulation by Kentucky courts." (Appendix page h).

CONCLUSION

If there was any question in anybody's mind about whether or not this accident robbed Mrs. Sweeney of her profession, it would appear that the letter from the employer terminating her when she could not come back to work within thirty days proves up her disability. Furthermore, the fact that two physicians on the very hospital staff, Dr. Powell, the neurosurgeon, and Dr. Bell, the rehabilitation doctor, attest to her total disability, which makes this one of the rare cases where the overwhelming evidence is so favorable to the Appellant that reasonable men can not disagree.

Finally, this Court should consider the extreme judgment entered here based upon one time examining physicians. They had not treated Mrs. Sweeney, yet the treating physicians were disregarded. As stated above, "opinions are deserving of emulation by Kentucky courts."

The evidence in this case compels a finding in favor of the appellant. And therefore, we respectfully ask this Honorable Court to reverse the Court of Appeals decision.

G C Perry, III

G. C. PERRY, III
PERRY & MILLER
P.O. BOX 900
PAINTSVILLE, KY 41240
(606) 789-5395