COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2007-SC-000885-WC

ANDREA SUE SWEENEY — APPELLANT

VS

KING'S DAUGHTERS MEDICAL CENTER;
HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

BRIEF ON BEHALF OF APPELLEE,
KING'S DAUGHTERS MEDICAL CENTER

CERTIFICATE OF SERVICE

This will certify that the original and nine copies of the foregoing brief were served via hand-delivery to the Supreme Court of Kentucky, Capitol Building, Room 209, 700 Capitol Avenue, Frankfort, Kentucky 40601; and served upon the following by mailing a true copy to: Office of Workers' Claims, Appeals Branch, 657 Chamberlin Avenue, Frankfort, Kentucky 40601; G. Chad Perry, III, Esq., PO Box 900, Paintsville, Kentucky 41240; Hon. Grant S. Roark, Administrative Law Judge, 410 West Chestnut Street, Suite 700, Louisville, Kentucky 40202, on this the 25th day of February, 2008.

A. STUART BENNETT, ESQ.
JACKSON KELLY PLLC
PO BOX 2150
LEXINGTON, KY 40588
(859) 255-9500

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MAY IT PLEASE THIS HONORABLE COURT:

I. STATEMENT CONCERNING ORAL ARGUMENT

This Appellee respectfully asserts that oral arguments would not assist this Honorable Court in ruling on the issues raised in this appeal.

II. COUNTERSTATEMENT OF POINTS AND AUTHORITIES

A. THE ADMINISTRATIVE LAW JUDGE AND THE WORKERS' COMPENSATION BOARD DID NOT MISCONSTRUE "THE LAW OF PRE-EXISTING INJURY."

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B. THE ADMINISTRATIVE LAW JUDGE'S ULTIMATE CONCLUSIONS WERE SUPPORTED BY SUBSTANTIAL EVIDENCE.

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C. THIS HONORABLE COURT IS WITHOUT AUTHORITY TO HOLD THAT THE OPINIONS OF TREATING PHYSICIANS MUST BE GIVEN MORE WEIGHT.

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III. COUNTERSTATEMENT OF THE CASE

The Appellant began her employment at King's Daughters Medical Center in 1995. She worked as an operating room nurse and in that capacity worked as both a scrub nurse and a circulating nurse.

The record showed that the Appellant initially experienced neck pain in 1999. Her condition worsened considerably in 2002 and Dr. Powell performed cervical spine fusion surgery at the C5-6 level on December 6, 2002. The Appellant returned to work approximately three months later.

On September 23, 2004 the Appellant was helping reposition a patient in the operating room when she felt something pull in her neck and left shoulder. She began to experience neck and left shoulder pain. She returned to work on light duty status but was taken off work after one week. She has not worked since September 30, 2004.

The Appellant returned to see Dr. Powell, her treating neurosurgeon, and testified that he had not recommended any additional surgery. She was referred to Dr. Bell for pain management and also saw Dr. Boyer for another neurosurgical consult.

Dr. Bajorek performed neurological testing. She underwent a full diagnostic workup including a cervical spine MRI on October 14, 2004 and EMG/NCV testing on December 15, 2004. She testified that she had last seen Dr. Powell on May 10, 2006. She testified that Dr. Powell told her to come back as needed, that he confirmed that there was no indication for additional surgery, and that he did not schedule any additional diagnostic testing.

The Appellant's proof before the Administrative Law Judge included reports from Dr. Bell, Dr. Powell and Dr. Bajorek. It also included the report and deposition of Dr. Herr and the report and deposition of Dr. Rice.

In his July 11, 2006 report Dr. Bell listed these impressions:

1. Anterior cervical discectomy and fusion C5-6, Cervical Spondylosis w/o myelopathy, Cervical Radiculitis and Cervicalgia.
2. Carpal Tunnel Syndrome.
3. Mild ulnar palsy.
4. Occipital neuralgia with occipital headache.

Dr. Bell listed the following in the Recommendations section of his report:

> I am in support of this patient's disability application. In my opinion, she is totally and permanently disabled from her current occupation and from any occupation for which she is qualified by means of education, training or experience.

In his May 10, 2006 report Dr. Powell offered these observations and conclusions:

> Reviewed studies with her including most recent MRI, which is unchanged from 2004. See no definite evidence of compression. Metallic resonance artifact is seen from previous plating.
>
> The patient had previous reaction to myelogram pre-operatively with post-myelogram headache. In light of non-specific, non-dermatomal pattern, I do not see specific indication for myelogram.

> Assessment is that of cephalgia secondary to work injury. No indication for surgical management. Patient pleased to hear same.
>
> Recommend permanent disability for patient. She is unable to return to nursing duty with lifting. She is also unable to return to the occupation of nursing with prolonged chart work because of neck pain. Recommend permanent retirement.

Dr. Bajorek performed EMG testing on the left and right upper extremities. His interpretation of the results for the left side was:

> Normal study without radiculopathic findings or entrapments.

Dr. Bajorek's interpretation of the results for the right side was:

> Abnormal study:
> 1) No evidence for an active radiculopathy cervically either in paraspinals or distally.
> 2) Left tardy ulnar palsy unchanged from prior study in 2002.
> 3) Right mild carpal tunnel syndrome without denervation.

Dr. Herr evaluated the Appellant at the request of her counsel on April 25, 2006. His diagnosis was, "Herniated Cervical disc C4-5." He assessed a 28% impairment and concluded in the Form 107 that there was no active impairment prior to the compensable injury.

Dr. Herr was deposed for the purpose of cross-examination on June 15, 2006. His report referred to the March 28, 2006 cervical MRI and he had the films with him on the day he was deposed. His interpretation was:

> Most recent cervical spine MRI study is dated March 20, 2006. That should be 28. The study shows surgical artifact at C5-6 and artifact obscuring diagnostic detail between C5 and C7.

Dr. Herr admitted that while he had concluded in his report that there was a herniated cervical disc at C4-5, he could not definitively state that there actually was a

herniated disc at that level. He admitted that the artifact from the fusion hardware obscured the view of that disc space. He reluctantly admitted that he could not definitively make out a ruptured disc at that level. Dr. Herr noted that the most recent EMG/NCV study of December 15, 2004, showed "no evidence for a radiculopathy of cervical spine and upper extremities."

Dr. Herr confirmed that on physical examination the motor function had been within normal limits and that sensory testing had likewise been within normal limits. The reflex testing had showed:

> There were some abnormalities in the reflexes that would be consistent with compromised nerve function. She had trace to absent triceps on the right. And the left triceps was absent. On the right the brachioradialis was absent. Also absent on the left. So there were some - there were some deficiencies in the - in the reflexes in the upper extremities.

Dr. Herr admitted that those reflex abnormalities could be attributable to most any portion of the cervical spine, including the site of the fusion at C5-6.

Dr. Herr acknowledged that cervical spine fusion surgery had been done in December of 2002 and that having undergone that surgery the Appellant was at that time entitled to a permanent impairment rating under DRE Cervical Category IV. Dr. Herr confirmed that because she had undergone a cervical spine fusion she had "alteration of motion segment integrity" and therefore was entitled to a permanent impairment rating under DRE Cervical Category IV.

Dr. Rice evaluated the Appellant at the request of her counsel on April 1 and May 6, 2006. His diagnosis was, "Herniated cervical disc of C4/5." He assessed a

15% impairment and concluded in his Form 107 that the Appellant did not have an active impairment prior to the compensable injury.

Dr. Rice was deposed for the purpose of cross-examination on July 26, 2006. He reluctantly agreed that because the Appellant had undergone cervical spine fusion surgery in December, 2002, she had an "alteration of motion segment integrity." He reluctantly agreed that at that time the Appellant would have been entitled to an impairment rating ranging from 25% to 28% under DRE Cervical Category IV. He acknowledged as much at page 7:

> I think I've already answered that, based on the C5/6 and the prior injury. I did not necessarily examine her for that particular injury. I do know what she reported to me as her level of function prior to the injury. But if you're asking me on a hypothetical basis, a person that has had a successful or unsuccessful attempt at surgical fusion, those people generally fall in that category.

Dr. Rice admitted that he had not reviewed the most recent cervical MRI taken in March, 2006 but instead had reviewed a radiologist's report regarding the October 14, 2004 cervical MRI. He acknowledged that the October 14, 2004 cervical MRI report made no reference to a "herniated disc" and instead referred only to a "posterior disc protrusion" at C4-5. He also acknowledged that the report indicated that the protrusion was not impinging on or distorting the spinal cord. The radiologist who interpreted the October 14, 2004, cervical spine MRI films noted that the films had been compared to a prior cervical MRI done on October 31, 2002 and that there had been some increase in the protrusion. Dr. Rice acknowledged that apparently the protrusion was already present at C4-5 as of October 31, 2002. Dr. Rice acknowledged that the October 14, 2004, cervical MRI films showed no definitive

nerve impingement at C4-5. He was able to so conclude because the disc protrusion did not impinge on the spinal cord and because the neural foramina were patent. Dr. Rice acknowledged that the December 15, 2004 EMG/NCV showed "no evidence of radiculopathy."

King's Daughters Medical Center's proof before the ALJ consisted of a report from Dr. Sheridan and a report and deposition from Dr. Best.

Dr. Sheridan evaluated the Appellant on August 11, 2005. He took a history, reviewed medical records, performed a physical examination, and reviewed x-ray films dated December 15, 2004, an MRI report dated October 14, 2004 and an EMG/NCV study dated December 25, 2004.

The December 15, 2004 cervical spine x-rays showed a fusion with cervical plating at C5-6 with moderate narrowing at C4-5 and C6-7. The October 14, 2004 cervical spine MRI showed an artifact at C6-7, a fusion at C5-6 with plating, and some bulging at C4-5. The full report of the October 14, 2004 cervical spine MRI was:

> Patient with a new anterior C5-6 fusion unfortunately the hardware does cause significant field distortion at this level and the C6-7 levels are not well evaluated; there probably is increasing disc disease at the levels just above and below the fusion.

Dr. Sheridan's diagnosis was, "Resolved acute cervical strain." He found no evidence of permanent impairment, placing the Appellant in DRE Category I pursuant to the 5th edition of the AMA Guides.

Dr. Best evaluated the Appellant on May 2, 2006. He took a history, reviewed extensive medical records, performed a physical examination and administered a Functional Capacity Evaluation.

Dr. Best noted that the December 15, 2004 EMG/NCV study showed no evidence of active radiculopathy. It further showed that a left tardy ulnar palsy was present, but was unchanged from the prior study done in 2002. It showed right mild carpal tunnel syndrome without denervation. Dr. Best noted that Dr. Boyer had reviewed a cervical MRI that he interpreted as showing "minimal disc bulging at C5-6."

In his report Dr. Best observed that:

> The physical examination today of Ms. Sweeney is plagued by submaximal and inconsistent efforts. She had numerous episodes of break-away weakness which is nonphysiologic. Objectively, we can determine no specific abnormality. There was no loss of reflex or atrophy noted. (Neither Drs. Powell or Boyer, neurosurgeons, could find signs of radiculopathy. Neither recommended additional surgical intervention).

Dr. Best noted that based upon the prior cervical spine fusion the Appellant belonged in DRE Cervical Category IV and was entitled to a 25% whole person impairment. He found no objective evidence that a harmful change had occurred as a result of the September 23, 2004 injury. He concluded that there was no objective basis upon which to assess any additional impairment.

When deposed, Dr. Best confirmed that there were no findings on physical examination consistent with cervical radiculopathy. Specifically, he found no evidence of nerve impingement at the C4-5 level. Dr. Best testified that:

Also, when we looked specifically at the function of C4-5,

> which you should see with a C4-5 nerve root compression and/or radiculopathy, you would see a weakness in the deltoid muscle and you would also see a reduction in the biceps reflex on testing. And I found neither of those on physical examination.

Dr. Best confirmed that there was no evidence of a sensory abnormality involving C4-5. Specifically, he testified as follows:

> No, that what you would see is–a radiculopathy of C4-5 should produce a sensory deficit in the anterior portion of the shoulder and toward the deltoid muscle, and I did not find any there, or on her diagram did the patient indicate numbness or tingling.

Dr. Best testified that in performing the range of motion testing he did not feel that he had the Appellant's full cooperation. He noted numerous examples of submaximal effort, including submaximal effort throughout all of the strength testing. He described the Functional Capacity Evaluation as an objective assessment as opposed to a subjective assessment, noting that the level of effort is objectively measured.

Dr. Best reviewed a cervical MRI done on March 28, 2006 and issued a supplemental report dated July 31, 2006. He noted that Dr. Carrico had compared the March 28, 2006 cervical MRI to an October 14, 2004 cervical MRI. Dr. Carrico had made these observations:

- Patient has undergone anterior cervical discectomy and fusion at the C5-6 level. This is associated with susceptibility artifact. Because of improvement in technology, the susceptibility artifact is less obscuring than on the prior study
- No significant spinal canal or foraminal narrowing is appreciated
- Mild spondylosis particularly at C3-4
- No disc herniation
- Probably no significant interval change since prior exam of 10/14/04

Dr. Best offered these observations:

> My personal review of the cervical MRI correlates well with the findings of Dr. Carrico. Indeed, there is minimal artifact noted from the previous surgical procedure at C5-6. At no level do I find a disc herniation, foraminal stenosis or nerve root impingement.
>
> My previous Independent Medical Evaluation performed May 2, 2006 extensively reviewed the records of the treating physicians Jerrel Boyer D.O., a neurosurgeon who indicated "I again reviewed an MRI (10/14/04) of a cervical spine which shows minimal disc bulging at C5-6. I have reviewed her electrical studies (EMG) which did not demonstrate any radiculopathy. (No disc herniation; no radiculopathy.)
>
> James Powell M.D., neurosurgeon on November 3, 2004 noted "Preliminary review of the films (MRI 10/14/04) did not show anything grossly outstanding other than the previous fusion and plating with magnetic susceptibility artifact. Neither neurosurgeon recommended additional surgical intervention. (No disc herniation).
>
> Orthopaedic surgeon, Richard Sheridan M.D. reviewed the cervical MRI of 1/14/04 and noted "there is a fusion at C5-6 with plating. There is a bulging disc at C4-5. He noted a negative Spurling's test. He found no evidence of radiculopathy. He considered the patient to be at maximum medical improvement. (No disc herniation; no radiculopathy.)
>
> Therefore, the patient, the October 14, 2004 MRI scan and the 12/15/04 EMG study has been evaluated by two neurosurgeons, Boyer and Powell and two orthopedic surgeon, Sheridan and myself. Nowhere in the physical examinations has there been a documented cervical radiculopathy. I've previously reviewed the most recent MRI scan performed on a new 1.5 Testra system also reviewed by the radiologist, James Carrico M.D. There is no cervical disc herniation at <u>any</u> level. My examination found no evidence of cervical radiculopathy. (Emphasis in original)

The Administrative Law Judge rendered his Opinion & Order on October 16, 2006. The ALJ thoroughly and carefully reviewed the entirety of the record and set forth the following Findings of Fact on pages 9 and 10:

> The primary issue in this case is whether plaintiff suffered any new permanent injury on September 23, 2004. There is no dispute plaintiff previously injured her neck and underwent a cervical fusion back in 2002. Plaintiff argues she returned to work after the 2002 surgery with no restrictions and with no problems under the events of September 23, 2004. In addition, plaintiff relies on the opinion of Dr. Rice to argue that plaintiff now has additional objective injuries above and/or below the level of the 2002 fusion.
>
> Having considered the available medical record, the Administrative Law Judge is most persuaded by the opinions of Dr. Sheridan and Dr. Best, each of whom concluded plaintiff has no additional findings beyond those resulting from the 2002 injury and surgery. Specifically, Dr. Best pointed out that two neurosurgeons, Dr. Boyer and Dr. Powell, each concluded plaintiff requires no additional surgery; that plaintiff's MRI did not show a recurrent or new disc herniation; and that plaintiff's EMG showed no evidence of cervical radiculopathy. He added that his review of the MRI, consistent with that of Dr. Carrico, did not reveal any disc herniation, foraminal stenosis, or nerve root impingement at any cervical level.
>
> The opinions of Dr. Best and Dr. Sheridan are considered more credible than those of Dr. Herr or Dr. Rice. Despite plaintiff's undisputed previous injury and cervical fusion, Drs. Herr and Rice each originally concluded plaintiff had no active impairment/disability prior to September 23, 2004. This, combined with the lack of any new objective findings as noted by Dr. Best or Dr. Sheridan, leads the Administrative Law Judge to conclude plaintiff has not suffered any new, permanent injury to warrant permanent benefits. As such, her claim must be dismissed. All other issues are thus rendered moot.

The Appellant pursued an appeal to the Workers' Compensation Board and it rendered an Opinion on March 2, 2007. The Workers' Compensation Board held as follows at pages 20 and 21:

> The medical report of Dr. Sheridan and Dr. Best's report, supplemental report, and deposition provide ample evidence to support the ALJ's conclusion in this matter. Dr. Sheridan diagnosed a resolved acute cervical strain and did not believe any further medical treatment was indicated. He opined

> Sweeney's impairment rating would be 0% DRE Category I based on the Guides, Fifth Edition and believed she was capable of returning to work in her former position as a Registered Nurse without restrictions. Dr. Best opined that as a result of the September 23, 2004 work injury, there was no objective evidence that a harmful change had occurred. He pointed out the MRI scan demonstrated no new change, disc herniation or nerve root compression and EMG/NCV studies showed no evidence of active radiculopathy in December, 2004. Dr. Best further opined that Sweeney could return to her full duties as an operating room nurse.
>
> The medical records cited above provide a sufficient basis to support the ALJ's findings. Roberts Brothers Co. v. Robinson, 113 S.W. 3d 181 (Ky. 2003). It cannot be said that the evidence compelled a different result. Special Fund v. Francis, supra. Accordingly, the opinion and order dated October 16, 2006 rendered by ALJ Roark is hereby **AFFIRMED**.

In a concurring opinion Board Chairman Gardner set out the following on page 22:

> The ALJ is always free to pick and choose among the medical evidence, including reliance on the credible opinion of an evaluating physician. Sweeney's burden on appeal in this case required that she demonstrate the opinions of Drs. Best and Sheridan were so lacking in probative value they must be disregarded as a matter of law.
>
> I agree with the majority that the evidence upon which the ALJ relied constituted substantial evidence and, for that reason, I too would affirm.

The Appellant pursued an appeal to the Court of Appeals. It rendered an Opinion on October 26, 2007. The Court of Appeals affirmed the Administrative Law Judge and the Workers' Compensation Board.

IV. ARGUMENT

A. THE ADMINISTRATIVE LAW JUDGE AND THE WORKERS' COMPENSATION BOARD DID NOT MISCONSTRUE "THE LAW OF PRE-EXISTING INJURY."

The standard of review was established in Western Baptist Hospital v. Kelly, 827 S.W. 2d 685 (Ky. 1992). Therein the Court held as follows:

> The WCB is entitled to the same deference for its appellate decisions as we intend when we exercise discretionary review of the Kentucky Court of Appeals' decisions in cases that originate in circuit court. The function of further review of the WCB in the Court of Appeals is to correct the Board only where the Court perceives that the Board has overlooked or misconstrued controlling statutes or precedents, or committed an error in assessing the evidence so flagrant as to cause gross injustice. The function of further review in our Court is to address new or novel questions of statutory construction, or to reconsider precedent when such appears necessary, or to review a question of constitutional magnitude. Id. at 687-688.

Under this standard of review, this Appellee respectfully asserts that this appeal must be dismissed.

The Appellant again asserts that the Administrative Law Judge misconstrued "The Law of Pre-Existing Injury." This Appellee respectfully asserts that the Appellant has confused the law regarding the arousal of a *pre-existing, dormant condition* with the law regarding a *pre-existing, active condition.*

It may be true that after recovering from the cervical spine fusion surgery in 2002, and prior to her September 23, 2004 injury, the Appellant was more or less pain-free and was working without restrictions. That she was able to do so does not

change the fact that because she had undergone cervical spine fusion surgery she had a pre-existing, active impairment prior to her work-related injury on September 23, 2004. The 5th edition of the AMA Guides dictates that as a result of having undergone that cervical spine fusion surgery the Appellant had a pre-existing, active impairment in the range of 25% to 28% pursuant to DRE Cervical Category IV. That 25% to 28% permanent impairment rating was not a pre-existing, *dormant* condition; it was a pre-existing, *active* condition.

It is important to note that not one of the medical experts described that part of the Appellant's fused cervical spine as a pre-existing, dormant condition. Thus, there is no basis in either law or fact for the Appellant's arguments. There simply was no proof that there had been an arousal of a pre-existing, *dormant* condition. There was ample proof that prior to the work-related injury the Appellant had a significant pre-existing, *active* condition.

With regard to this argument this Honorable Court is directed to the analysis provided by the Court of Appeals. For the convenience of the Court it is set out below:

> Sweeney cites *McNutt Constr./First Gen. Servs. v. Scott*, 40 S.W. 3d 854, 859 (Ky. 2001), in which the Kentucky Supreme Court held that despite changes in the workers' compensation law effective December 12, 1996, "disability which results from the arousal of a prior, dormant condition by a work-related injury remains compensable[.]" More specifically, the claimant in that case fell through the floor of a house while working and suffered a lower back injury. *Id.* at 856. Prior to the accident, the claimant suffered from a degenerative condition due to the natural aging process. *Id.* at 857. The court affirmed the ALJ, who concluded that "no portion of the claimant's disability should be excluded as being attributable to the natural aging process" and ultimately awarded permanent, total disability

benefits. *Id.* at 847, 861.

Here, the ALJ did not misconstrue the law regarding pre-existing conditions. Rather, he held that Sweeney had not proven that she sustained an injury, which is defined, in part, as meaning

> 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.

KRS 342.0011(1). Essentially, the ALJ was not persuaded that Sweeney's September 2004 work incident caused "a harmful change in the human organism evidenced by objective medical findings.

As there is medical evidence supporting this conclusion, as discussed above, the Board did not err by affirming the ALJ's opinion.

B. THE ADMINISTRATIVE LAW JUDGE'S ULTIMATE CONCLUSIONS WERE SUPPORTED BY SUBSTANTIAL EVIDENCE.

"Permanent partial disability" is defined in KRS 342.0011(11)(b) as:

...the condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work ....

"Permanent total disability" is defined in KRS 342.0011(11)(c) as:

...the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury....

"Permanent disability rating" is defined in KRS 342.0011(36) as:

...the permanent impairment rating selected by an administrative law judge times the factor set forth in the table that appears at KRS 342.730(1)(b).

"Permanent impairment rating" is defined in KRS 342.0011(35) as:

> ...percentage of whole body impairment caused by the injury or occupational disease as determined by 'Guides to the Evaluation of Permanent Impairment' American Medical Association, latest available edition ....

The Appellant had the burden of proving every essential element of her claim. Snawder v. Stice, 576 S.W. 2d 276 (Ky. App., 1979). In this claim it was the Appellant's burden to prove that the September 23, 2004 injury caused a "permanent impairment rating." Unless she could meet that burden she would not be entitled to an award of either "permanent partial disability" or "permanent total disability." The Administrative Law Judge concluded that the Appellant had failed in her burden of proof and he therefore dismissed her claim for income benefits. The evidence did not compel a finding in the Appellant's favor and the Administrative Law Judge's ultimate conclusions were supported by substantial evidence.

Because the Appellant was unsuccessful before the ALJ the question on appeal is whether the evidence was so overwhelming that it compelled a finding in her favor. Paramount Foods, Inc. v. Burkhardt, 695 S.W. 2d 418 (Ky., 1985). Compelling evidence is evidence that is so overwhelming that no reasonable person could reach the same conclusion as the ALJ. R.E.O. Mechanical v. Barnes, 691 S.W. 2d 224 (Ky. App., 1985). It is not enough for the Appellant to show that the record contained some evidence that would have supported an award. McCloud v. BethElkhorn Corporation, 514 S.W. 2d 46 (Ky., 1974). As long as the ALJ's ultimate conclusions are supported by any evidence of substance, it cannot be said that the evidence compelled a different result. Special Fund v. Francis, 708 S.W. 2d 641 (Ky., 1986).

Where there is sufficient conflict in the medical testimony, the ALJ has the sole authority to determine whom to believe. Pruitt v. Bugg Brothers, 547 S.W. 2d 123 (Ky., 1977). Because he was the trier of fact, the ALJ had the sole authority to determine the quality, character and substance of the evidence. Square D Co. v. Tipton, 862 S.W. 2d 308 (Ky., 1993). The ALJ had the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W. 2d 329 (Ky., 1997); Luttrell v. Cardinal Aluminum Company, 909 S.W. 2d 334 (Ky. App., 1995). As the factfinder, the ALJ could reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it came from the same witness or the same adversary party's total proof. Magic Coal v. Fox, 19 S.W. 3d 88 (Ky., 2000); Whitaker v. Rowland, 998 S.W. 2d 479 (Ky., 1999); Hall's Hardware Floor Co. v. Stapleton, 16 S.W. 3d 327 (Ky. App., 2000).

The ALJ's October 16, 2006 Opinion & Order carefully and exhaustively reviewed the entire record. In the end, the ALJ was simply more persuaded by King's Daughters Medical Center's proof in the form of the reports and testimony of Drs. Sheridan and Best. His analysis in support of his decision to ultimately adopt the conclusions offered by Drs. Sheridan and Best is unassailable and cannot be altered.

The ALJ had the discretion to adopt all or some parts of the Appellant's experts'' opinions and conclusions, but he was not compelled to do so. Through the conclusions of Drs. Sheridan and Best, and through the reluctant admissions by Drs. Herr and Rice on cross-examination, King's Daughters Medical Center proved that

the Appellant's prior cervical spine fusion surgery placed her in DRE Cervical Category IV and entitled her to a permanent impairment rating ranging from 25% to 28%. Taken as a whole, the proof showed that the September 23, 2004 injury had not resulted in a permanent impairment rating beyond that already attributable to the Appellant's prior cervical spine fusion surgery.

As she asserted before the Workers' Compensation Board and the Court of Appeals, the Appellant renews her argument that the ALJ had to accept the conclusions of her medical experts and find that the compensable injury had caused a permanent impairment rating beyond that attributable to her prior cervical spine fusion surgery. The Appellant failed in her burden of proof before the ALJ and on appeal there is no basis for finding that the evidence compelled a finding in her favor. The numerous decisions cited above preclude any reviewing body from substituting itself for the ALJ as the finder of fact.

Pursuant to the holding in Western Baptist Hospital v. Kelly, supra, it is readily evident that the Workers' Compensation Board and the Court of Appeals did not overlook or misconstrue controlling statutes or precedent, or commit an error in assessing the evidence so flagrant as to cause gross injustice. Accordingly, this appeal must be dismissed.

C. THIS HONORABLE COURT IS WITHOUT AUTHORITY TO HOLD THAT THE OPINIONS OF TREATING PHYSICIANS MUST BE GIVEN MORE WEIGHT.

As to the merits of this argument as it applies to the instant claim, this Appellee respectfully asserts that the standard demanded by the Appellant would

afford her no relief. At her discovery deposition the Appellant testified that she remained under the care of Dr. Bell and Dr. Adkins. She would see one or both of them when she returned from Maryland. In Maryland she was seeing a counselor. The record before the ALJ contained a report from Dr. Bell, but nothing from Dr. Adkins. In his July 11, 2006 report, Dr. Bell listed four diagnoses and opined that the Appellant was "permanently and totally disabled...." What Dr. Bell's report did *not* contain was either a permanent impairment rating or any opinion that the work-related injury had resulted in any additional permanent impairment beyond that caused by the prior cervical spine fusion surgery. Accordingly, Dr. Bell's conclusions could not have been relied upon by the ALJ in awarding benefits.

Otherwise, with regard to this argument this Appellee respectfully asserts that the Workers' Compensation Act is a creation of the Kentucky Legislature and only the Legislature has the authority to declare that opinions from certain physicians must be given more weight. They have done so and in this regard this Honorable Court's attention is directed to KRS 342.315. That statutory provision provides for "University evaluators" and provides, in relevant part, in subsection 2 as follows:

> Except as otherwise provided in KRS 342.316, the clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by Administrative Law Judges and the burden to overcome such findings and opinions shall fall on the opponent of that evidence.

This Appellee respectfully asserts that had the Legislature intended for a treating physician's opinion to be given more weight they would have enacted legislation to that end. They have not, and this Appellee respectfully asserts that this Honorable Court cannot judicially create a presumptive weight that must be afforded

to a treating physician's conclusions. That is a function expressly reserved to the Legislature.

In the alternative, this Appellee would note that as demonstrated by the numerous case citations set out above, the ALJs are the finders of fact and already have wide discretion in deciding what parts of the medical proof they will rely upon in rendering their ultimate conclusions regarding causation, permanent impairment and occupational disability. The presumption demanded by the Appellant is not necessary because the ALJs already have the discretion to rely upon the treating physician's opinions should they desire to do so. There simply is no need for a court to instruct an ALJ that a treating physician's opinions must be given more weight than an evaluator's.

Lastly, this Appellee respectfully asserts that the Sixth Circuit decisions relied upon by Justice Graves in his concurring Opinion are not relevant to workers' compensation claims pursued under Kentucky's Workers' Compensation Act. They are not relevant because those decisions concerned claims for Social Security Disability benefits, and the administrative regulations governing the adjudication of Social Security Disability claims provide that a treating physician's opinion is to be given special weight. [See 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2) (2002).]

In this regard it must also be noted that the Sixth Circuit has held that in a Federal Black Lung claim or an ERISA claim, a treating physician's opinion is *not* to be given any additional weight. [See Eastover Mining v. Williams, 338 F. 3d. 501(6th Cir., 2003) for a thorough review of the relevant holdings.]

Respectfully submitted,

A. STUART BENNETT, ESQ.

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