

RENDERED: JULY 18, 2008; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky  
Court of Appeals**

NO. 2008-CA-000234-WC

KARLO'S BISTRO ITALIA

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-05-72209

KAREN ROHLING; HONORABLE MARCEL SMITH,  
ADMINISTRATIVE LAW JUDGE; AND WORKERS'  
COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING IN PART AND  
REVERSING IN PART

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BEFORE: LAMBERT, MOORE, AND WINE, JUDGES.

LAMBERT, JUDGE: Karlo's Bistro Italia appeals from the Workers'

Compensation Board's opinion affirming the use of the statutory three multiplier

pursuant to Kentucky Revised Statutes (KRS) 342.730, the application of a 13

percent impairment rating, and the award of medical benefits pursuant to KRS 342.020. After careful review, we affirm in part and reverse in part.

On September 9, 2005, Karen Rohling (Rohling) was working as a prep cook for Karlo's Bistro Italia (Karlo's) when she sustained an injury to her low back while lifting items from a low shelf. She began experiencing pain in her lower back and left hip and sought medical treatment on September 12, 2005, with Dr. Quatkemeyer, her family physician. She treated with Dr. Quatkemeyer for several weeks, during which she underwent physical therapy. She continued to complain of pain in her lower back and left hip.

During the course of her treatment with Dr. Quatkemeyer, Rohling was rear ended while sitting at a stoplight on October 21, 2005. The pain in her lower back and hip increased, and she began to experience numbness and tingling radiating down into her left foot. An MRI dated October 28, 2005, revealed an L5-S1 disk herniation with nerve root compression. Kohling underwent physical therapy and two epidural injections which provided no relief. Ultimately, she underwent a lumbar discectomy on August 7, 2006, which relieved her radicular pain. She testified that she continues to have low back and left hip pain. After her surgery, she was released back to Dr. Quatkemeyer and sees her every three months.

On March 20, 2006, Rohling underwent an independent medical evaluation (IME) with Dr. Richard Sheridan. Dr. Sheridan reviewed the MRI dated October 28, 2005, and did not see any evidence of cord or root compression

at any level. He diagnosed Rohling's condition as resolved acute lumbar sprain as it pertained to the September 9, 2005, injury. He did not think that Rohling required any further medical treatment or work restrictions and believed she was at maximum medical improvement. Thus, he gave her a 0 percent impairment rating based on the AMA Guides.

Rohling underwent another IME with Dr. Thomas Bender on January 26, 2007. Dr. Bender diagnosed lumbar disc protrusion with left S1 radiculopathy and stated that within a reasonable medical probability, Rohling's September 9, 2005, work injury was the cause of her problems. He placed her impairment rating at 13 percent pursuant to Table 15-3 of the AMA Guides and stated that she did not retain the physical capacity to return to the type of work performed at the time of the injury because she could not stand for prolonged periods of time, could not meet required lifting restrictions, and could not stoop below thigh level.

In a supplemental report dated February 23, 2007, Dr. Bender noted that Rohling was involved in a motor vehicle accident on October 21, 2005, and that as a result of the accident, Rohling developed a clinical radiculopathy. He then opined that she had a 13 percent whole body impairment rating related to the event of September 9, 2005, and an additional 5 percent impairment due to the development of S1 radiculopathy from the October 21, 2005, car accident.

Ultimately, he indicated that Rohling had a pre-existing disc condition that began on September 9, 2005, and that the October 21, 2005, accident aggravated that condition and resulted in nerve root compression and radiculopathy. But for the

radiculopathy related to the motor vehicle accident, Rohling would not have required further lumbar disc surgery.

Dr. Bender produced yet another report on June 22, 2007, which indicated that Rohling had sustained a lumbar disc injury as a result of the work event of September 9, 2005, and that as a result of that injury, she had a *DRE lumbar category II impairment* which translated to an 8 percent impairment rating (emphasis added). As a result of the subsequent motor vehicle accident, this condition was accelerated into radiculopathy, which constituted an additional impairment and Dr. Bender opined the car accident resulted in a 5 percent impairment rating, bringing her to a total of 13 percent whole body impairment. Rohling filed a motion to file the June 2007 report of Dr. Bender on July 17, 2007, twenty-nine days after the formal hearing had been held. Karlo's filed an objection and motion to strike; however the record fails to reflect whether the Administrative Law Judge (ALJ) ruled on either Rohling's motion to file the report out of proof time or Karlo's objection and motion to strike the report.

Rohling underwent an IME with Dr. Timothy Kriss on March 19, 2007. Dr. Kriss assigned an 11 percent whole body impairment pursuant to Table 15-3 DRE category III of the 5<sup>th</sup> edition of the AMA Guides. He diagnosed Rohling as a status-post left L5-S1 lumbar discectomy for left L5-S1 disc herniation with left S1 nerve root compression and left S1 lumbar radiculopathy. Dr. Kriss did not think that the back pain Rohling complained of was a residual from the original September 9, 2005, work accident, and he believed the pain was a

consequence of the whiplash type injury occurring in the motor vehicle accident of October 21, 2005. After looking at all the evidence, Dr. Kriss noted that the October 21, 2005, motor car accident was the more probable cause of Rohling's eventual diagnosis of left L5-S1 disc herniation, left S1 nerve root compression, and left S1 lumbar radiculopathy and the associated surgery. He did not think that the September 9, 2005, work injury caused any of the above problems and did not believe that Rohling was going to suffer permanent harm or impairment solely as a consequence of the September 9, 2005, injury. He therefore assigned the entirety of his 11 percent impairment rating to the October 21, 2005, car accident and did not assign any permanent impairment to the September 9, 2005, work incident.

The ALJ's findings of fact and conclusions of law found that Rohling had suffered a work injury as defined by the Act. Regarding Rohling's impairment, the ALJ specifically stated,

I am more persuaded by the opinion of Dr. Bender on this issue. Dr. Bender's opinion that [sic] 13% impairment is attributable to the work injury alone is supported by objective medical findings during treatment and on examination. I am persuaded that the automobile accident caused to [sic] further impairment that [sic] did not cause all the impairment. I find that plaintiff did suffer an injury as defined by KRS 342.0011(1). I find that [sic] 13% impairment was caused by the work injury.

Further, the ALJ was persuaded by Dr. Bender's conclusions that Rohling did not retain the physical capacity to return to the type of work she performed at the time of the injury. Regarding medical benefits, the ALJ concluded that Dr. Bender was

correct in his analysis that, but for the automobile accident, the plaintiff would not have had to have surgery and thus the medical expenses related to the surgery are not compensable under KRS 342.020. Otherwise, Rohling was entitled to future medical benefits under KRS 342.020.

On August 24, 2007, Karlo's filed a motion for reconsideration. In that motion, it pointed out that the ALJ did not ever issue an order regarding the admissibility of the June 22, 2007, report of Dr. Bender. Further, Karlo's argues that the ALJ erred in finding that the September 9, 2005, work injury generated a 13 percent impairment rating and asked the ALJ to revisit the previous finding that the statutory multiplier contained in KRS 342.730(1)(c)1 applied as well as the award of future medical benefits. The ALJ entered an order denying Karlo's petition for reconsideration, stating that the evidence did not preclude that any and all future treatment for the work injury was ruled out and therefore medicals should remain open pursuant to KRS 342.020. The ALJ then summarily denied the remainder of Karlo's petition.

On January 11, 2008, the Workers' Compensation Board issued its opinion affirming the ALJ's opinion and award. The Board did note, however, that the ALJ did not make reference to Dr. Bender's June 22, 2007, report and that although the record did not indicate that an order was entered either on the motion to admit or the motion to strike, it can be inferred that the ALJ did not consider this medical report in the opinion and award or in the order regarding the motion for reconsideration. This appeal followed.

Our standard of review of Workers' Compensation Board decisions is well known in that 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." *AK Steel Corp. v. Childers*, 167 S.W.3d 672, 675 (Ky.App. 2005). Karlo's argues that the ALJ erred as a matter of law by relying on Dr. Bender's 13 percent impairment rating as the basis for a permanent partial disability award. The Workers' Compensation Board found that substantial evidence supported a finding that the September 9, 2005, injury generated such a rating. The court noted that in a Form 107 dated January 26, 2007, Dr. Bender concluded that Rohling had a 13 percent impairment rating pursuant to Table 15-3 of the AMA Guides. However, in Dr. Bender's report dated February 23, 2007, he found that as a result of the September work accident, Rohling had a left-sided L5-S1 disc protrusion and that as a result of the October car accident, she developed a clinical radiculopathy which resulted in the diskectomy. He then determined that as a result of the September work accident, she had a 13 percent impairment and as a result of the October car accident, she had an additional 5 percent impairment rating, for a total whole body impairment of 18 percent. Karlo's argues that the ALJ improperly relied on Dr. Bender's impairment ratings because Dr. Bender did not properly follow the AMA Guides. We agree.

Table 15-3, DRE lumbar category III impairment requires:

Significant signs of radiculopathy, such as dermatomal and/or in a dermatomal distribution, sensory loss, loss of relevant reflex(es), loss of muscle strength or measured unilateral atrophy above or below the knee compared to measurements on the contra lateral side at the same location; impairment may be verified by electrodiagnostic findings or history of a herniated disc at the level and on the side that would be expected from objective clinical findings, associated with radiculopathy, or individuals who had surgery for radiculopathy but are now asymptomatic or fractures (1) 25% to 50% compression of one vertebral body; (2) posterior element fracture with displacement disrupting the spinal canal; in both cases the fracture has healed without alteration of structural integrity.

Pursuant to the Fifth Edition of the AMA Guides, a prerequisite for application of a DRE lumbar category III impairment requires Rohling to have sustained a fracture or a radiculopathy as a result of the September 9, 2005, event. There is no medical evidence in the record that Rohling ever sustained a fracture as a result of the September work accident. Further, there is no evidence in Dr. Bender's reports or otherwise indicating radiculopathy resulting from the September work accident. In fact, Dr. Bender specifically attributes the radiculopathy to the October 21, 2005, car accident in his report dated February 23, 2007. Accordingly, his reliance on the DRE lumbar category III impairment rating was misguided and was not in fact based on the AMA Guides.

KRS 342.730(1)(b) mandates a permanent impairment rating caused by an injury must be determined by utilization of the AMA Guides to Evaluation of Permanent Impairment. In *Jones v. Brasch-Barry General Contractors*, 189 S.W.3d 149, 152 (Ky.App. 2006), the court held:

[a]n ALJ cannot choose to give credence to an opinion of a physician assigning an impairment rating that is not based on the AMA Guides. In other words, a physician's latitude in the field of workers compensation litigation extends only to the assessment of a disability rating percentage within that called for under the appropriate section of the AMA Guides...Under our law, the AMA Guides are an intrical [sic] tool for assessing a claimant's disability rating and monetary award. So to be useful for the fact finder, a physician's opinion must be grounded in the AMA Guides . . . .

Accordingly, the ALJ in the instant case erred as a matter of law in relying on Dr. Bender's impairment rating as it was not properly based on the AMA Guides. In fact, Dr. Bender realized his error and stated in his report dated June 22, 2007, that Rohling in fact had a DRE lumbar category II impairment which translated to an 8 percent impairment rating as a result of the September 9, 2005, work injury. He further opined that as a result of the October motor vehicle accident, Rohling's condition was accelerated into radiculopathy, which created an additional 5 percent impairment rating for a total of 13 percent whole body impairment. Accordingly, Dr. Bender ultimately found that Rohling had an 8 percent impairment rating as a result of the work accident at issue in this case. The ALJ's reliance on the improper 13 percent impairment rating constitutes an "error in assessing the evidence so flagrant as to cause gross injustice" and is not supported by substantial evidence. Accordingly, we reverse the judgment of the Worker's Compensation board affirming the ALJ's finding of a 13 percent impairment and remand for proceedings consistent with this opinion.

Karlo's also argues that the ALJ erred as a matter of law in concluding that Rohling did not retain the physical capacity to return to the type of work performed at the time of the injury as a result of the September 9, 2005, work injury. Karlo's specifically argues that such a finding is not supported by substantial evidence and that the Workers' Compensation Board's affirmation of the ALJ's award fails to identify substantial evidence of record upon which the ALJ properly relied. We disagree.

The ALJ relied on Dr. Bender's IME reports and Form 107's, which stated that as a result of the work injury, Rohling could no longer stand for prolonged periods of time, stoop below thigh level, and that she required lifting restrictions. Accordingly, the ALJ properly concluded that Rohling did not retain the capacity to return to the type of work performed at the time of the injury at issue in this case, which included lifting heavy pots, picking up heavy bags of tomatoes and potatoes from low shelves, etc. We therefore affirm the portion of the ALJ's award utilizing the statutory three multiplier found in KRS 432.730(1)(c)1, given the finding that Rohling could no longer perform her duties as a prep cook.

Finally, Karlo's argues that the ALJ erred as a matter of law in concluding that Rohling was entitled to future medical benefits pursuant to KRS 342.020 and that the Board erred in affirming the ALJ's award in this regard. We find no error in the ALJ's award of future medical benefits or in the Board's affirmation of such award. In *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313

(Ky. 2007), the Kentucky Supreme Court found that where there is evidence of a permanent impairment rating in accordance with the AMA Guides and attributable to a work injury, absent evidence that points to the necessity for medical treatment to another source, an award of future medical benefits is mandated. Karlo's argues that the necessity for medical treatment can be attributed to another source, the October 2005 motor vehicle accident. However, Dr. Bender attributed an 8 percent impairment rating to the work accident and thus, there was a permanent impairment rating in accordance with the AMA Guides, albeit not the one the ALJ ultimately accepted. The subsequent 5 percent impairment rating can be attributed to another source, however the 8 percent impairment rating cannot. Because the 8 percent impairment rating can be attributed to the accident, we affirm the ALJ and Workers' Compensation Board's opinions awarding future medical benefits under KRS 342.020.

For the reasons set forth herein, we affirm in part and reverse in part, remanding the portion of the ALJ's award indicating a 13 percent impairment rating with instructions that the proper 8 percent impairment rating be used.

ALL CONCUR.

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