

RENDERED: August 29, 2003; 2:00 p.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001358-WC

PATTI CLAXON

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-00-82555

GREENUP COUNTY SCHOOLS;  
HON. IRENE STEEN, ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \* \*

BEFORE: JOHNSON AND KNOPF, JUDGES; AND MILLER, SENIOR JUDGE.<sup>1</sup>

JOHNSON, JUDGE: Patti Claxon has petitioned for review of an opinion of the Workers' Compensation Board entered on May 29, 2002, which affirmed an order by the Administrative Law Judge

---

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

(ALJ) that dismissed Claxon's claim. Having concluded that the evidence did not compel a finding for Claxon, we affirm.

Prior to 1985, Claxon was a housewife and did not work outside the home. She undertook a part-time job as a substitute cook for Greenup County Schools beginning in 1980. In 1988 she became employed full-time by Greenup County Schools, working approximately six and one-half hours per day. Claxon was employed in the cafeteria, and her duties included washing dishes and silverware, scrubbing pots and pans, stacking trays, handling trays with one hand while scooping, dipping, and serving food with her other hand, slicing fruits, layering meats and cheeses, preparing rolls and mashed potatoes, cutting dough for rolls, and washing all the pots and pans used in the preparation of the food. She additionally stocked cases of food on shelves, swept, mopped, and cleaned. On days when French fries were served, she would stand in front of the fryer, lift the baskets out of the fryer and dump the fries out. She helped prepare breakfast and lunch for about 200 children.<sup>2</sup>

Claxon alleged a carpal tunnel syndrome injury on December 21, 1998. She asserted this as the date of her work-related injury because this was the date she was first examined by Dr. Ray Kleykamp, her family physician. Dr. Kleykamp

---

<sup>2</sup> There were a total of four employees in the cafeteria. Three employees prepared the food and one employee served as the dishwasher.

diagnosed Claxon with bilateral carpal tunnel syndrome and opined that the injuries were work-related. In January 1999 Claxon told her supervisor, Sandy Collier, that she had been diagnosed with carpal tunnel syndrome and that she felt her injuries were work-related.

During her deposition, Claxon testified that she had first experienced some pain and numbness in her hands in 1995. Claxon additionally testified that, in 1998, her hobbies were painting signs and making crafts, including using her sewing machine to sew pillows and dolls. She had engaged in these types of hobbies since the late 1980's. When Dr. Kleykamp evaluated Claxon in 1998, she did not remember whether he asked her about her activities.

Dr. Kleykamp referred Claxon for problems with her knee to Dr. Howard Feinberg, an osteopath specializing in arthritis. Dr. Feinberg inquired as to whether Claxon was having any other problems, and Claxon told him about her wrist injuries. Dr. Feinberg first administered injections to Claxon's wrists, followed by the execution of a nerve conduction test. Dr. Feinberg opined that Claxon needed surgery.

On January 21, 2000, Dr. James Powell performed right ulnar nerve decompression and right carpal tunnel lysis on Claxon. His preoperative diagnosis was ulnar neurotherapy and carpal tunnel syndrome bilaterally. On March 29, 2000, Claxon

returned to Dr. Powell for symptoms of occasional numbness and tingling in her forearm, especially with her hand in extension. Dr. Powell's examination revealed that there could be some pressure consistent with mild tendon irritation and some persistent ulnar weakness.

On April 27, 2000, Claxon underwent left ulnar nerve release of the elbow, left carpal tunnel lysis, and application of short arm splint by Dr. Powell. Claxon saw Dr. Powell on August 2, 2000, and indicated that the numbness in her hand had improved after surgery, but that she now had recurrent numbness and tingling. She also experienced difficulty using her hands. Her physical examination showed minimal weakness in the ulnar nerve. Dr. Powell noted that Claxon's repetitive motion on her job was directly responsible for the bilateral ulnar and median neuropathies. An EMG/NCV was performed on both upper extremities on August 30, 2000, with reports of continued sharp pain when using her hands. Claxon indicated that she tried to return to work at Greenup County School for three days in August 2000, but was unsuccessful. Based on the normal results of the EMG/NCV studies, Dr. Powell found that this was old nerve damage that had no resolution and referred Claxon to Dr. Martin Kassar for a second opinion.

Dr. Kassar testified that he was a plastic surgeon and had training in hand and microsurgery. Dr. Kassar first

evaluated Claxon on September 19, 2000, for symptoms of pain in her hands and fingers, with numbness and tingling, pain radiating up to her arms and to her elbows, weakness and decreased grip strength, and being awakened from sleep due to the pain. His physical examination revealed no evidence of Tinel's sign<sup>3</sup> at the wrist and no evidence of either ulnar tunnel or pronator syndrome on the right side, but there was a positive Tinel's sign at the distal end of the cubital tunnel release. On the left side, Claxon had positive Tinel's sign at the distal forearm overlying the median nerve and at the distal end of the scar over the cubital tunnel release. An examination of Claxon's cervical spine indicated full range of motion upon flexion of the neck, but that she had developed severe pain in her arms when she tried to bring her chin to her shoulders or her ear to her shoulder. Dr. Kassan testified that his diagnosis was residual upper extremity pain, status post bilateral carpal tunnel release and bilateral cubital tunnel release with questionable residual carpal tunnel syndromes bilaterally and questionable cervical radiculopathy and found that her condition was related to her job as a cook. At that

---

<sup>3</sup> A positive Tinel's sign was defined by Dr. Kassan as follows: "We [physicians] strike over the course of the nerves with the finger to elicit an abnormal response, an electrical xxx, paresthesias, tingling. This usually indicates some form of compression or tightness and actual simulating the nerve at that level."

time, Dr. Kassan recommended X-rays and an MRI of the neck to rule out any cervical problems.

Dr. Kassan further testified that Claxon returned to him on October 3, 2000, for reevaluation and reported continued pain in her hands. He ordered a cervical spine X-ray, which revealed mild degenerative changes of the cervical spine with some osteophyte formation. He also ordered an MRI scan, which showed moderate asymmetric bulging of the C5-6 and C6-7 on the left with mild compression of the thecal sac and mild left neural foraminal encroachment and mild concentric bulging of the C4-5 disc without herniation or impingement on the neural foramina. Dr. Kassan indicated that although Claxon had signs of spinal pathology, he was unable to make a definite diagnosis or assign an impairment rating at that time because he was unsure what her level of involvement was and she had not reached maximum medical improvement at that time. At the time of his last examination, Dr. Kassan felt that Claxon was unable to return to work and recommended evaluation by a neurologist with the possibility of therapy with traction and anti-inflammatory medication.

In an additional report dated October 2, 2001, Dr. Kassan stated that Claxon had evidence of positive clinical findings of median nerve dysfunction evidenced by residual Tinel's sign and electrical conductive delays on EMG. He placed

her in a Grade 2 classification and decreased superficial cutaneous pain and tactile sensibility with abnormal sensations or moderate pain that carried a 61-80% sensory deficit rating. In regards to her right arm, he assigned 24% impairment for the median nerve and 4% for the ulnar nerve, for a total of 27% upper extremity impairment for the right arm. In regards to her left arm, he assigned 31% upper extremity impairment for the medial nerve and 6% for the ulnar nerve, for a total of 35% upper extremity impairment. For whole person impairment, he assigned 53% based on a combination of the above calculations.

Dr. Bansal testified that he first evaluated Claxon on December 14, 2000, based on a referral by Dr. Kassan. At that time, Claxon reported having undergone carpal tunnel release, but only had about 20% improvement in the numbness and tingling in both hands. His physical examination revealed a Tinel's sign and some spasms in the neck. He performed nerve condition studies and an EMG, which showed a bilateral median nerve neuropathy consistent with the diagnosis of bilateral carpal tunnel syndrome. He noted that there was a study done on August 15, 2000, that showed no evidence of carpal tunnel syndrome, although Claxon had symptoms of carpal tunnel at that time. A second study was done on April 6, 2001, which showed evidence of carpal tunnel syndrome. Dr. Bansal testified that he evaluated Claxon on six different occasions and that his diagnosis

included carpal tunnel syndrome, cervical disc disease, depressive disorder, and chronic migraines. He found that her carpal tunnel syndrome was from continuous, repetitive wrist movement and from using her hands on a long-term basis in her job as a cook.

Dr. Bansal indicated that his last examination of Claxon was on August 28, 2001, at which time she still had complaints of neck pain and tingling and numbness in both hands. Specifically, she had numbness when driving her car and was awakened at night with numbness. Her physical examination revealed positive Tinel's sign for median and ulnar nerves. Dr. Bansal testified that he recommended lifting restrictions and no fine manipulations with her hands. He also recommended that Claxon undergo steroid injections or that he re-explore the carpal tunnel again. He was awaiting a decision from Claxon. He assigned a 10% impairment rating, attributing 5% to the carpal tunnel syndrome and 5% to the pain associated with the carpal tunnel. He also testified that he diagnosed Claxon with depressive disorder and related it to the chronic pain in her neck and hands. Regarding her treatment for depression, he prescribed medication, but did not refer her to a psychiatrist. Dr. Bansal did not feel that Claxon could return to work on a sustained basis because she was unable to perform repetitive motions with her hands or do fine manipulations.

On cross-examination, Dr. Bansal testified that Claxon advised him that her upper extremity problems were caused by her work activities many years ago, even prior to the first time she was evaluated by Dr. Feinberg or Dr. Powell. Dr. Bansal indicated that he attributed the carpal tunnel problems to her work activities, but did not feel that her cervical problems were work-related. If he assigned an impairment rating for the cervical problems alone, it would be no more than 5% for her neck, using the DRE model, category 2. Regarding restrictions for her neck, he recommended not lifting more than ten to 15 pounds at a time. Specifically, he assigned a total of 13% impairment, which included the carpal tunnel problems, depressive disorder, and the pain in her hands.

Greenup County Schools introduced into evidence the medical report of Dr. Powell, dated December 8, 1999. At the time of his evaluation, Claxon reported symptoms of pain in both hands, and numbness and tingling in the thumb tip which had been present for several years. Dr. Powell's physical examination revealed bilateral ulnar weakness and median neuropathy weakness at the wrist. Claxon also had positive Tinel's sign at both wrists and at the olecranon fossa. Dr. Powell diagnosed Claxon with ulnar neuropathy and carpal tunnel and scheduled her for bilateral ulnar and median nerve decompression on January 11,, 2000. He also indicated that Claxon did a lot of crafts with

her hands and that it was his opinion her carpal tunnel and ulnar neuropathy were not work-related.

Greenup County Schools also introduced into evidence the deposition of Dr. Ronald Burgess, an orthopedic surgeon. Dr. Burgess testified that he evaluated Claxon on April 26, 2001. He reviewed the previous medical records of Drs. Kleykamp, Feinberg, Powell, Kassan, and Bansal, performed a physical examination of Claxon, and conducted an X-ray of the wrist. At the time of the evaluation, Claxon reported symptoms of pain in both hands and wrists, with pain up to her elbow, accompanied by an occasional aching, throbbing-type pain in her hands and numbness in the tip of her left thumb. She also noted that household chores caused severe pain in both arms. His physical examination showed the cervical spine to be within normal limits, and he found no evidence of any reflex, motor, or sensory deficits, and no evidence of abnormalities of range of motion in the neck or upper extremities. Dr. Burgess's X-ray of her wrist was normal and he was unable to find any clinical evidence of positive Tinel's.

Based on his review of the medical records and the physical examination, Dr. Burgess concluded that Dr. Feinberg's studies had been faulty and the surgery performed by Dr. Powell had been unnecessary. He noted that Dr. Feinberg had performed a second study on August 8, 2000, which he had interpreted as

being abnormal, and then, seven days later, Dr. Bansal performed a third study that was within normal limits. In fact, Claxon's complaints had continued to be the same after the surgery, with an additional finding of numbness in the tip of her left thumb. Dr. Burgess indicated that he had found no evidence of either carpal tunnel syndrome or ulnar neuropathy, and that any cervical problem that might be found on further evaluation would not be work-related. Dr. Burgess found that Claxon had reached maximum medical improvement and assigned a 0% permanent impairment, based on the 5th Edition of the American Medical Association (AMA) Guidelines. At that time, he diagnosed Claxon with diffuse complaints of pain, with no neurologic abnormalities, and he attributed the pain more to a fibromyalgia-type syndrome. He was unable to find any evidence of a work-related injury or condition and indicated that Claxon's job activities would not cause an injury or condition. He found no reason for ongoing medical treatment or surgical procedures, and found no reason to impose work restrictions.

Greenup County Schools also introduced into evidence the medical report of Dr. David Shraberg. Prior to his evaluation, Dr. Shraberg reviewed medical reports from Drs. Kleykamp, Powell, Feinberg, Kassan, and Burgess, as well as various EMG and nerve conduction studies. Dr. Shraberg found that Claxon's pain would not be relieved with surgery and found

that she had a 0% psychiatric impairment rating. He also found that she was able to return to work and diagnosed her with atypical depression with strong somatization (non work-related); symptom magnification and false attribution of symptoms to her work as a cook; status post left and right ulnar and median nerve releases; and stressors including work and midlife. Her SAF score was 80. Dr. Shraberg did recommend, however, that Claxon would benefit from an anti-depressant medication.

The ALJ, in pertinent part, made the following findings of fact and conclusions of law:

Based upon this record I am not persuaded that Plaintiff has carried her burden of proof. Although it seems that Plaintiff was very busy during her working hours in the cafeteria, there does not appear to be a work related connection to her problems according to Dr. Burgess, upon whom I choose to rely. He stated that her activities would not cause carpal tunnel syndrome. In fact, he found no evidence of this condition whatsoever, but attributed Plaintiff's problems to fibromyalgia. To bear this out, Plaintiff appeared to have received no relief from the surgery and actually has now developed a numbness in the tip of her left thumb. Dr. Burgess opined that the studies by Dr. Feinberg were faulty and he noted that even Dr. Bansal had found normal EMG/NCV studies 7 days after Feinberg's. Therefore, I find that Plaintiff's condition is not work-related. As a consequence, the remaining issues herein are rendered moot.

The ALJ dismissed Claxon's claim on February 26, 2002.<sup>4</sup> On May 29, 2002, the Board affirmed the ALJ's decision and dismissed Claxon's appeal. This petition for review followed.

Claxon argues that the ALJ erred when she determined that Claxon failed to meet the burden of proof of work-relatedness in her claim for an alleged injury of bilateral carpal tunnel syndrome. Claxon's sole assignment of error on appeal is that the ALJ abused her discretion by choosing to rely on Dr. Burgess, rather than the other physicians. Claxon claims that the evidence compelled a finding in her favor. She asks this Court "to make a distinction from the line of cases that state that the Administrative Law Judge had the sole discretion in which doctor to believe." She claims the ALJ's decision was unreasonable and not supported by substantial evidence.

The ALJ's award or order "shall be conclusive and binding as to all questions of fact, but either party may . . . appeal to the Workers' Compensation Board for the review of the order or award."<sup>5</sup> "The board shall not substitute its judgment for that of the administrative law judge as to the weight of the evidence on questions of fact . . . ."<sup>6</sup> The Supreme Court of

---

<sup>4</sup> Claxon notes that Greenup County Schools did not even file a brief to the ALJ and yet "the [ALJ] still ignored [her] arguments." However, what relief, if any, Claxon seeks from this statement is unclear.

<sup>5</sup> Kentucky Revised Statutes (KRS) 342.285(1).

<sup>6</sup> KRS 342.285(2).

Kentucky "has construed KRS 342.285 to mean that the fact-finder, rather than the reviewing court, has the sole discretion to determine the quality, character, and substance of evidence."<sup>7</sup> KRS 342.285 has been further construed to mean that, as fact-finder, the 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[.]"<sup>8</sup> "When the . . . Board reviews the findings of the ALJ, its review is restricted to a determination of whether the factual findings of the trier of fact were 'clearly erroneous.'"<sup>9</sup>

"Although a party may note evidence that would have supported a conclusion that is contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal."<sup>10</sup> The Board does not have the authority to substitute its judgment for that of the ALJ on issues regarding the weight to be afforded to the evidence involving questions of fact.<sup>11</sup>

Decisions rendered by the Board are subject to direct review by

---

<sup>7</sup> Burton v. Foster Wheeler Corp., Ky., 72 S.W.3d 925, 929 (2002)(citing Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985)).

<sup>8</sup> Burton, supra at 929 (citing Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977)).

<sup>9</sup> Union Underwear Co. v. Searce, Ky., 896 S.W.2d 7, 9 (1995)(citing Hudson v. Owens, Ky., 439 S.W.2d 565, 568 (1969)).

<sup>10</sup> Burton, supra at 929 (citing McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46, 47 (1974)).

<sup>11</sup> KRS 342.285.

this Court.<sup>12</sup> "KRS 342.290 limits the scope of review by the Court of Appeals to that of the Board and also to errors of law arising before the Board."<sup>13</sup>

Claxon, as the claimant in her workers' compensation action, had "the burden of proof and the risk of persuading the [ALJ] in [her] favor."<sup>14</sup> In that Claxon was unsuccessful before the ALJ, the question on appeal is "whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in [her] favor."<sup>15</sup> This Court may only reverse the ALJ's decision "if the evidence presented compelled a finding for [Claxon]."<sup>16</sup> "For the evidence to be compelling, the evidence produced in favor of [Claxon] must be so overwhelming that no reasonable person could reach the conclusion of the ALJ."<sup>17</sup>

Claxon alleges that five physicians found she had carpal tunnel syndrome, while only Greenup County Schools' physician found that she did not have carpal tunnel syndrome. Contrary to Claxon's assertion, the evidence in this case was

---

<sup>12</sup> CR 76.25(1).

<sup>13</sup> Burton, 72 S.W.3d at 929.

<sup>14</sup> Snawder v. Stice, Ky.App., 576 S.W.2d 276, 279 (1979)(citing Tackett v. Sizemore Mining Co., Ky., 560 S.W.2d 17 (1977); and Caudill, 560 S.W.2d at 15).

<sup>15</sup> Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735, 736 (1984).

<sup>16</sup> REO Mechanical v. Barnes, Ky.App., 691 S.W.2d 224, 226 (1985).

<sup>17</sup> Id.

neither so unanimous nor so "clear and convincing" as to compel the ALJ to find in her favor.<sup>18</sup> Rather, the physicians' testimony regarding the causation of Claxon's injuries was "far from unanimous and hardly conclusive."<sup>19</sup>

Regarding medical testimony, our Supreme Court has held that the ALJ has "the right 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."<sup>20</sup> After reviewing all of the evidence, the ALJ was thus authorized to rely upon the testimony of Dr. Burgess, to the exclusion of the other physicians. The ALJ was entitled to believe the findings of Dr. Burgess, an evaluating physician, over the findings of the treating physicians.<sup>21</sup> As noted by the former Court of Appeals, "[t]he probative value of the evidence is not determined by the number of doctors who testify."<sup>22</sup>

The ALJ determined based on Dr. Burgess's findings that Claxon's injuries were not work-related. Nevertheless, Claxon relies upon the reports and findings of Drs. Kleykamp, Powell, Feinberg, Kassan, and Bansal, all of whom she claims

---

<sup>18</sup> Snawder, 576 S.W.2d at 280; see also Young v. Phelps Collieries, Ky., 439 S.W.2d 77 (1969).

<sup>19</sup> Snawder, supra.

<sup>20</sup> Caudill, 560 S.W.2d at 16.

<sup>21</sup> Republic Steel Corp. v. Justice, Ky., 464 S.W.2d 267, 270 (1971).

<sup>22</sup> McCloud, 514 S.W.2d at 47.

diagnosed her as suffering from carpal tunnel syndrome.

However, a review of the record indicates that their testimony was not dispositive of the issue of work-relatedness.

For instance, Claxon alleges, and the ALJ found, that Dr. Powell diagnosed her with carpal tunnel syndrome bilaterally. However, after initially examining Claxon, Dr. Powell concluded that because "[s]he does lots and lots of crafts, . . . the issue of carpal tunnel and ulnar neuropathy are not work-related." Thus, while at one time Dr. Powell did not believe Claxon's injuries to be work-related, he later did find them to be work-related. It was within the purview of the ALJ to place less emphasis on Dr. Powell's findings because of this inconsistency.

Additionally, Dr. Kassan diagnosed Claxon with carpal tunnel syndrome, which he related to her job as a cook. Although Dr. Kassan testified that he was aware of Claxon's position as a cook and the types of activities she performed, he further testified that he did not inquire into any great degree of detail regarding her employment. Furthermore, he testified that he did not inquire about her outside hobbies and interests. Dr. Kassan testified that, over ten years, he had seen many cooks in his practice who have had problems similar to Claxon's injuries; therefore, his opinion that her injuries were related to her employment were premised more upon his experience in

treating other patients than upon Claxon's specific history. Again, it was within the purview of the ALJ to place less emphasis upon Dr. Kassan's testimony due to his failure to inquire into any other possible sources for Claxon's injuries.

Similarly, Dr. Bansal testified that he did not inquire into the specifics regarding Claxon's duties as a cook. He had no idea how long Claxon had worked as a cook for Greenup County Schools. Additionally, while Dr. Bansal believed that Claxon's carpal tunnel injuries were work-related, he testified that her cervical problems were not work-related. Dr. Bansal also testified that carpal tunnel syndrome can be the result of activities having no relationship to a patient's work.

Thus, there was conflicting medical testimony and the evidence did not compel a finding in Claxon's favor. The Board correctly affirmed the ALJ's dismissal of Claxon's claim.

For the foregoing reasons, the opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffrey D. Hensley  
Flatwoods, Kentucky

BRIEF FOR APPELLEE:

Ronald J. Pohl  
Lexington, Kentucky