

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2005-CA-000953-WC

WHITEHALL FURNITURE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-01992

MARY WILKINS;
WORKERS' COMPENSATION BOARD;
AND HON. RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

BARBER, JUDGE: The Appellant, Whitehall Furniture (Whitehall), petitions for review of a decision of the Workers' Compensation Board (WCB) that affirmed a determination by the Administrative Law Judge (ALJ) that Appellee, Mary Wilkins (Wilkins), had timely filed her claim and her injuries were work related. We affirm the decision of the WCB because substantial evidence supports the finding of the ALJ.

Wilkins began working for Whitehall in 1972 as a seamstress upholstering office furniture. In 1983, she

developed carpal tunnel syndrome in her right wrist. The carpal tunnel syndrome was corrected through surgery. Later, in 1988, Wilkins developed carpal tunnel syndrome in her left wrist. Wilkins was again treated with surgery and the condition was corrected. Each of these surgeries required Wilkins to be off work approximately six weeks. During that time, Whitehall paid for Wilkins' medical expenses and temporary total disability for the surgeries and time off work. Wilkins did not formally file a workers' compensation claim for either incident of carpal tunnel syndrome.

Prior to the development of the carpal tunnel syndrome in Wilkins' left wrist, she was diagnosed with Kienbock's disease in that wrist in 1993 by Dr. William Reid. Kienbock's disease is a rare disease that causes deterioration of the lunate bone, the wrist bone that is second from the thumb side and is shaped like a crescent moon. Wilkins informed Pat Mulligan¹ of Whitehall about her Kienbock's disease. Whitehall paid for Dr. Reid's medical bills. The workers' compensation insurance carrier ended payment of medical bills in 1995; however, Whitehall agreed to pay any related medical expenses not covered by Wilkins' health insurance. Despite her Kienbock's Disease, Wilkins continued to work at Whitehall until the plant closed December 13, 2001.

¹ One of Pat Mulligan's duties for Whitehall was to handle workers' compensation claims.

After the closure, Wilkins attempted to work at two other jobs during March 2002. The first was at Unifirst where she sewed decals onto uniforms. The pain in Wilkins' wrist made it difficult for her to work and she left Unifirst after only three days. Later that same month, Wilkins obtained a position at Field Packing Co. packing meat into boxes. Again, the pain in Wilkins' wrist resulted in her quitting after one eleven-hour shift.

In April 2002, Dr. William Milnor² told Wilkins that her left wrist bone had crumbled due to the Kienbock's Disease and recommended bone fusion in her left wrist. Wilkins then returned to Whitehall and informed Mr. Mulligan³ of what Dr. Milnor had told her and asked if the company would pay for her anticipated medical expenses. Mr. Mulligan said he would have to discuss it with the new owner, Paoli Furniture. Wilkins was later informed that Paoli Furniture agreed to pay medical expenses not covered by her medical insurance.

Dr. Milnor fused Wilkins' left wrist bone in August 2002. The surgery resulted in Wilkins' left wrist being permanently immobilized. However, after the surgery, Wilkins did retain movement of the fingers on her left hand. Paoli

² Dr. Milnor took over the practice of Dr. Reed following Dr. Reed's retirement.

³ Mr. Mulligan was the only person remaining at Whitehall to wrap-up operations.

Furniture did not pay for all of Wilkins' excess medical expenses.⁴ Wilkins then filed a formal workers' compensation claim based on her Kienbock's disease in October 2002.

After two final hearings,⁵ the ALJ awarded benefits to Wilkins⁶ for a TTD for August 1, 2002 (date of fusion) until February 18, 2004 (date Dr. Milnor opined that Wilkins had reached maximum medical improvement). The ALJ also awarded benefits to Wilkins for PPD for the subsequent period of continued disability not to exceed 425 weeks. Each party filed a motion requesting the ALJ to reconsider his decision, but both motions were denied. Whitehall appealed to the WCB and the WCB affirmed the ALJ's Opinion and Award in its entirety. Whitehall now appeals the WCB's determination.

Whitehall presents two primary arguments in its appeal. First, Whitehall claims that the ALJ's finding that Wilkins' Kienbock's disease is work-related is not supported by the evidence. Second, Whitehall claims that the ALJ erred when he awarded TTD and PPD since Wilkins' claim was untimely and not work-related.

⁴ Wilkins stated that Paoli Furniture paid for about three bills totaling approximately \$150 in her January 26, 2004 deposition.

⁵ The first hearing on April 26, 2004 was presided by ALJ Kevin King. ALJ King was subsequently replaced in June 2004. The second hearing on October 12, 2004 was presided by ALJ Richard M. Joiner.

⁶ The ALJ's Opinion and Award were dated November 17, 2004.

Whitehall first argues that the medical evidence does not support the finding by the ALJ that Wilkins' Kienbock's disease is work-related. When a claimant succeeds in his burden of proof in a workers compensation claim and an adverse party appeals, the question before the court is whether the decision of the board is supported by substantial evidence.

Transportation Cabinet v. Poe, 69 S.W.3d 60, 62 (Ky. 2001), (citing Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky. 1984)). Substantial evidence is evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable people. Id. (citing Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367, (Ky. 1971)). The ALJ has the sole authority to determine the weight, credibility, and substance of the evidence and to draw reasonable inferences from the evidence. Id., see also KRS 342.285. The ALJ has the discretion to choose whom and what to believe. Id., (citing Pruitt v. Bugg Brothers, 547 S.W.2d 123, 125 (Ky. 1977)). The ALJ, as fact-finder, 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. Burton v. Foster Wheeler Corp., 72 S.W.3d 925, 929 (Ky. 2002), (citing Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977)).

The medical evidence submitted in this matter consisted of an independent medical examination (IME) by Dr. Timothy Scott Prince;⁷ medical records from Dr. William Milnor from April 2, 2002 to February 18, 2004;⁸ September 15, 2004 deposition of Dr. Prince;⁹ and records of the Office of Workers' Claims regarding injuries on July 31, 1998 and December 13, 2001¹⁰. The ALJ stated the following in his Opinion and Award:

In 1993, she was diagnosed with [K]ienbock's disease of the left wrist. This condition degenerated and resulted in surgical treatment on August 1, 2002. Dr. Prince testified that the Kienbock's disease would have been at least significantly aggravated, if not, in fact, caused by the repetitive activity of her wrist. This is the only opinion concerning causation in the record. Therefore, I conclude that Ms. Wilkins has had cumulative trauma arising out of and in the course of her employment which is the proximate cause producing a worsening of the Kienbock's disease as evidenced by objective medical evidence.

The ALJ correctly stated that the only opinion concerning the actual cause of Wilkins' Kienbock's disease was presented by Dr. Prince.

The following pertinent statements about Wilkins' Kienbock's disease causation were made by Dr. Prince during his September 15, 2004 deposition:

⁷ Submitted by Wilkins.

⁸ Submitted by Wilkins.

⁹ Submitted by Whitehall.

¹⁰ Submitted by Whitehall.

Q. Now, is Kienbock's disease something that the general public gets or is this something that is peculiar to factory workers or people who do repetitive-type tasks?

A. Members of the general public can get it. It's not - the genesis of it is not well understood at all. There is not clear - one reason, because it's so very rare, it's not clear what factors lead to it. There certainly is some fault among the people that treat it that trauma may make it even more symptomatic or may make it show up earlier. No one really knows if trauma is an initiating cause of it or not.

. . .

Q. Over that period of time, and given that she had been working there since 1972, is the Kienbock's disease related to her repetitive work activities?

A. With the - what I said earlier about no one knows, maybe, what initiates it, certainly I would think - given it's a rare condition, I would think that the general opinion of most people, including myself - most people who treat this, including myself is, that it is in this kind of case, that it would have been at least significantly aggravated, if not, in fact, caused by the repetitive activity of her wrist.

. . .

Q. Given this woman's history of having continued to work and wanting to work after that initial diagnoses, would you attribute the progress of the condition, the worsening of the condition to her work activities after that?

A. I would certainly say that her work activities aggravated the condition, yes.

Also, Dr. Prince stated in his report¹¹ that "Wilkins' wrist symptoms began and were aggravated by work conditions. While Kienbock's syndrome is not completely understood, it is generally felt to be consistent with trauma, including repetitive trauma, causing the destruction of the bone."

Medical causation must be proved to a reasonable medical probability with expert medical testimony, but KRS 342.0011(1) does not require it to be proved with objective medical findings. Brown-Forman Corp. v. Upchurch, 127 S.W.3d 615, 621 (Ky. 2004), (citing Staples, Inc. v. Konvelski, 56 S.W.3d 412, 415 (Ky. 2001)). It is the quality and substance of a physician's testimony, not the use of particular "magic words," that determines whether it rises to the level of reasonable medical probability, i.e., to the level necessary to prove a particular medical fact. Id., (citing Turner v. Commonwealth, 5 S.W.3d 119, 122-123 (Ky. 1999)). Whitehall did not challenge Dr. Prince's credibility at any time nor did they present an alternate theory of causation.

As stated above, the ALJ has the sole authority to determine the weight, credibility, and substance of the evidence and to draw reasonable inferences from the evidence. Burton supra 72 S.W.3d at 929. Dr. Prince's testimony could have provided a basis for the conclusion sought by Whitehall, but it

¹¹ Form 107.

also provided a basis for the determination of Wilkins' condition being work-related. The ALJ may choose which evidence to believe when it is conflicting, even when it is from the same witness. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). The ALJ chose to believe Dr. Prince's opinion that Wilkins' Kienbock's Disease was caused by her position at Whitehall. We believe the ALJ's finding of work-relatedness was supported by substantial evidence.

Whitehall's next argument is that the ALJ erred when he awarded TTD and PPD since Wilkins' claim was untimely and not work-related. Despite the number of gradual injury claims and the difficulties encountered in attempting to apply KRS 342.185 to those claims, the legislature has not chosen to create special rules to govern the period of limitations for claims for gradual injury. Alcan Foil Products v. Huff, 2 S.W.3d 96, 100 (Ky. 1999).

In cases where the injury is the result of many mini-traumas, the date for giving notice and the date for clocking a statute of limitations begins when the disabling reality of the injuries becomes manifest. Randall Co. v. Pendland, 770 S.W.2d 687, 688 (Ky.App. 1989). "Manifestation of disability" refers to physically and/or occupationally disabling symptoms which lead the worker to discover that a work-related injury has been sustained. Special Fund v. Clark, 998 S.W.2d 487, 490 (Ky.

1999). It follows that where a claim is not filed until more than two years after the worker's discovery of an injury and the fact that it was caused by work, KRS 342.185 would operate to prohibit compensation for whatever occupational disability is attributable to trauma incurred more than two years preceding the filing of the claim. Id.

The ALJ found that a portion of Wilkins' claim was in fact time barred. In his report, Dr. Prince assigned an 18% whole body impairment rating to Wilkins in her post-operative state. Dr. Milnor assigned a 19% whole body impairment rating to Wilkins in her post-operative state in his medical records. The ALJ found that there must be an exclusion for any impairment which existed before two years prior to the claim. Based on medical records, Dr. Prince found Ms. Wilkins to have a 6% whole body impairment rating in 1993. Immediately prior to the fusion operation, Dr. Prince found there was an 8% impairment. Based on this information, the ALJ found that the compensable portion of Wilkins' claim was a PPD based on 10% whole body impairment. Based on the record, we believe the ALJ's finding was supported by substantial evidence.

In awarding TTD, the ALJ noted that Wilkins had surgery on August 1, 2002 and reached maximum medical improvement therefrom on February 18, 2004 according to the medical records of Dr. Milnor. The ALJ found that the surgery

which was performed on August 1, 2002 was performed for worsening of her condition, which had occurred in the last two years. Based on this, the ALJ awarded Wilkins TTD for the period August 1, 2002 through February 18, 2004. We believe that this finding is supported by substantial evidence contained in the record.

Whitehall also argues that it did not receive timely notice from Wilkins as required under KRS 342.185(1). The ALJ found that Whitehall clearly had notice of "the accident" based upon the circumstances. Wilkins testified that she first notified Mr. Mulligan at Whitehall of her Kienbock's disease diagnoses in 1993. Notice of a physical injury carries with it notice of all those things which may reasonably be anticipated to result from it. Dawkins Lumber Co. v. Hale, 299 S.W. 991, 992 (Ky. 1927); see also Reliance Diecasting Co. v. Freeman, 471 S.W.2d 311, 313 (Ky. 1971). Whitehall paid for treatment given by Dr. Reid at that time. Even when the workers compensation insurance company ceased payment in 1995, Whitehall agreed to pay Wilkins' medical expenses not covered by her health insurance.

Wilkins also spoke with Whitehall in April 2002,¹² prior to receiving the fusion surgery on her left wrist, to see if they would agree to help with the upcoming medical expenses.

¹² Wilkins spoke to Pat Mulligan at the plant.

The purchasing company, Paoli Furniture, agreed to pay for any medical expenses associated with the fusion surgery not covered by Wilkins' medical insurance. None of Wilkins' testimony in relation to notification of her condition was disputed by Whitehall during the proceedings. Based on the record, we believe the ALJ's conclusion that Whitehall had notice of the accident was supported by substantial evidence.

Whitehall lastly argues that the ALJ erred when he awarded TTD and PPD benefits to Wilkins because her Kienbock's disease was not work-related. As stated earlier, we believe there is substantial evidence in the record to support the ALJ's finding that Wilkins' Kienbock's disease was work-related; therefore, it is not necessary to address the merits of this argument.

Based on the foregoing, the decision of the WCB is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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