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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001150-WC

CHARLEY'S HEADQUARTERS, INC. — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-03-67407

AGNES WILLIAMS; HON. HOWARD E. FRASIER, JR., ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, KNOPF, AND VANMETER, JUDGES.

JOHNSON, JUDGE: Charley's Headquarters, Inc. has petitioned for review from the May 6, 2005, opinion of the Workers' Compensation Board which affirmed the Administrative Law Judge's award of benefits to Agnes Williams for a work-related cumulative trauma injury. Having concluded that the Board did not overlook or misconstrue controlling case law, we affirm.

Williams is a 45-year-old licensed cosmetologist. From 1983 until 2003, she was the sole owner of Charley's

Headquarters, a beauty salon located in Harlan, Kentucky. Williams, in her deposition filed on July 9, 2004, stated that her job as a cosmetologist involved cutting, curling, foiling, shampooing, blow drying and styling hair. She further stated that because of the repetitive use of both hands, involving pushing, pulling, and flexing, that beginning in 2000 she began to notice pain, numbness, and loss of grip strength in her hands and wrists.[1] During this time, Williams contacted her workers' compensation carrier, which paid all bills related to medical treatment from 1999-2001.

On June 14, 2001, Williams was examined by Dr. Farook K. Ghory at Appalachian Regional Healthcare (ARH) in Harlan, Kentucky. Williams complained of pain and numbness in both hands. Dr. Ghory diagnosed bilateral carpal tunnel syndrome, scheduled EMG studies, and prescribed medication for pain. On September 4, 2001, and November 1, 2001, Williams saw Dr. Fazal H. Ahmad, also of ARH, who reviewed the EMG studies and determined that it was positive for carpal tunnel syndrome. Dr. Ahmad recommended surgery following additional abnormal EMG studies, but Williams chose not to undergo the surgery.

On November 12, 2003, Dr. Moez R. Premji, Williams's treating physician, diagnosed Williams with carpal tunnel

[1] Williams also alleged a work-related neck injury in her application for workers' compensation benefits. However, Williams's alleged neck injury is not an issue in this appeal.

syndrome and informed her that the injury was work-related. Based on Dr. Premji's findings, Williams filed her Form 101, Application for Resolution of Injury, on February 3, 2004.

In support of her claim, Williams filed the report of Dr. Christa U. Muckenhausen, who performed an independent medical evaluation on March 15, 2004. Dr. Muckenhausen performed a physical examination of Williams and reviewed Williams's medical records. She diagnosed Williams with "bilateral carpal tunnel syndrome secondary to repetitive mini-trauma on the job as a beautician . . . ." Dr. Muckenhausen noted that Williams's complaints related to her work. She assessed Williams with a 13% whole body impairment based on the AMA Guides to the Evaluation of Permanent Impairment, and recommended that she lift and carry a maximum of ten pounds infrequently, lift and carry less than ten pounds frequently, and perform limited pushing and pulling. In a follow-up report dated July 8, 2004, Dr. Muckenhausen confirmed that the development of carpal tunnel syndrome did not require "forceful flexion of the extremities" and that Williams's carpal tunnel was caused by her work as a cosmetologist.[2]

Charley's Headquarters submitted the medical report of Dr. Kenneth Graulich, who conducted an independent medical

[2] Charley's Headquarters objected to the filing of this supplemental report, but not on any grounds related to causation of Williams's carpal tunnel syndrome. The objections were overruled by the ALJ.

evaluation of Williams on May 12, 2004. Dr. Graulich performed a physical exam of Williams and reviewed Williams's medical records. He diagnosed bilateral carpal tunnel syndrome and assessed a 19% whole body impairment based on the AMA Guides. However, Dr. Graulich stated that he did not believe Williams's injuries were caused by her work as a cosmetologist, because a cosmetologist's work was not "the most forceful and severely repetitive type work."

Charley's Headquarters also submitted the medical report of Dr. Richard Dubou. Based on his review of Williams's medical records, Dr. Dubou noted that even after Williams stopped working in 2003, her symptoms did not improve. Dr. Dubou stated:

> The vast amount of carpal tunnel diagnoses are not caused by work or repetitive motion but by other factors such as association with obesity (Kasden) and "The Journal of Hand Surgery", cigarette smoking, diabetes, thyroid and amaloid, etc. Where work is a proximal factor it is fairly obvious and is caused by repetitive work requiring flexion of the wrist, industrial type vibratory tools, impact hammers or air guns or repetitive lifting requiring flexion and extension of the wrist. . . . Likewise, being a hairdresser is not truly a repetitive action such as would be found in a factory. There are breaks between clipping and significantly longer breaks than clients. More to the point, if the job were the proximate cause of a carpal tunnel pathology, the difference between the right hand [and] the left hand would be marked since very few right handed people can use

> scissors with their left hand. In Ms. Williams' case, the findings are only slightly worse on the right than the left.[3]

The issues presented to the ALJ included causation of the carpal tunnel syndrome, the statute of limitations for the carpal tunnel claim, and the extent of her disability. After reviewing the lay and medical evidence the ALJ determined that "based on established precedent, a worker who sustains a gradual injury is not barred from filing a claim as long as it is filed within two years of the date a physician informs the worker the injury is due to the work." On October 4, 2004, the ALJ entered his opinion and award relying on Dr. Muckenhausen's diagnosis regarding causation and Dr. Graulich's 19% impairment rating. He awarded permanent partial disability benefits at the rate of $202.68 for 425 weeks from November 14, 2003, with interest at the rate of 12% per annum on all past and unpaid compensation.

Charley's Headquarters filed a timely petition for reconsideration wherein it claimed the ALJ erred by relying on Dr. Graulich's impairment rating since it was Dr. Graulich's opinion that Williams's injury was not work-related. It also argued that Williams had not provided sufficient expert evidence to prove causation. Finally, Charley's Headquarters argued that "[s]ubmission of bills to a self-employed person's own workers'

[3] Dr. DuBou attributed Williams's carpal tunnel to obesity, based on his erroneous conclusion that she was 5'5" tall and weighed 165 pounds.

compensation insurance carrier, triggers the two year statute of limitations."

On November 9, 2004, the ALJ entered an order denying the petition, with a minor recalculation of the award of benefits. Charley's Headquarters appealed to the Board, which affirmed the ALJ on May 6, 2005. This petition for review followed.

When reviewing one of the Board's decisions, this Court will only reverse the Board's decision when it has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice.[4] To properly review the Board's decision, this Court must ultimately review the ALJ's underlying decision. Where the ALJ has found in favor of the employee, who had the burden of proof, this Court must determine whether the ALJ's findings were supported by substantial evidence.[5] The Supreme Court of Kentucky has defined substantial evidence as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable [people]" [citation omitted].[6] In other words, substantial evidence is, "evidence

[4] Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992).

[5] Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). See also Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky.App. 1984).

[6] Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971).

which would permit a fact-finder to reasonably find as it did."[7] And, as the fact-finder, the ALJ, not this Court and not the Board, has sole discretion to determine the quality, character, and substance of the evidence.[8] Not only does the ALJ weigh the evidence, but the ALJ may also choose to believe or disbelieve any part of the evidence, regardless of its source.[9]

Williams's testimony was that she had been experiencing pain and numbness in her hands and wrists as early as 1999, and that the problem continued to worsen. She further conceded that she thought the problem was work-related from the outset, and she requested and was paid workers' compensation benefits from 1999 to 2001. Williams described in detail the physical demands of her work to which she attributed her hand and wrist pain. There is evidence that Williams sought treatment beginning in 1999; however, it was not until November 2003 that she was informed by her treating physician that the condition was work-related.

The Supreme Court of Kentucky and the Kentucky Court of Appeals have long recognized the complexity in resolving the beginning date for the clocking of the statute of limitations

[7] Special Fund, 708 S.W.2d at 643.

[8] Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999) (citing Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418, 419 (Ky. 1985)). See also Snawder v. Stice, 576 S.W.2d 276, 279 (Ky.App. 1979).

[9] Whittaker, supra (citing Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977)).

for cumulative trauma claims. Prior to 1999, it was held that limitations began to run on a cumulative trauma claim when the disabling reality of the work injury became manifest.[10] This longstanding "manifestation of disability" standard was clarified in the notable Supreme Court case of Alcan Foil Products v. Huff.[11] In Alcan Foil, the Supreme Court held that the onset of "occupational disability" no longer has any bearing on determining the date from which the period of limitations begins to run or in determining an injured worker's obligation to give notice. In making this determination, the Court expressly stated as follows:

> In Pendland, the worker became aware of her injury when she experienced disabling symptoms of pain; thus, the manifestation of physical and occupational disability occurred at the same time. The question remains, therefore, whether the phrase "manifestation of disability" refers to the physical disability or symptoms which cause a worker to discover that an injury has been sustained or whether it refers to the occupational disability due to the injury. We conclude that it refers to the worker's discovery that an injury had been sustained. We arrive at this conclusion for several reasons: 1.) the court's explicit statement that the period of limitations runs from the date of "injury;" 2.) the fact that the definition of "injury" contained in KRS 342.0011(1) refers to any work-related harmful change in the human organism, and

[10] Randall Co./Randall Division of Textron, Inc. v. Pendland, 770 S.W.2d 687 (Ky.App. 1989).

[11] 2 S.W.3d 96 (Ky. 1999).

> does not consider whether the change is occupationally disabling; and 3.) the entitlement to workers' compensation benefits begins when a work-related injury is sustained regardless of whether the injury is occupationally disabling.[12]

Since Alcan, the law has been that where a worker discovers that a physically disabling injury has been sustained, becomes aware that the injury is caused by work, and fails to file a claim within two years of that date, his claim will be barred by the statute of limitations. The Supreme Court reaffirmed its position in Special Fund v. Clark,[13] holding that the two-year statute of limitations established in KRS 342.185 begins to run in claims involving work-related cumulative trauma when the worker discovers (1) the fact that an injury has occurred, and (2) the fact that it was caused by work.

Additionally, we must consider the Supreme Court's holding in Hill v. Sextet Mining Corp.,[14] which was rendered following Alcan Foil. In Hill, the Court assigned special importance to the date on which a claimant first acquires knowledge that a work-related cumulative trauma injury is permanent. Hill involved a cumulative trauma claim where the injured worker held a personal belief for several years that a cervical condition that had gradually developed over time was in

[12] Alcan Foil, 2 S.W.3d at 101.

[13] 998 S.W.2d 487 (Ky. 1999).

[14] 65 S.W.3d 503 (Ky. 2001).

fact work-related. With regard to notice and limitations, the Supreme Court stated as follows:

> Implicit in the finding of a gradual injury was a finding that no one instance of workplace trauma, including those specifically alleged and those of which the employer was notified, caused an injury of appreciable proportion. Instead, the ALJ concluded that the harmful change that gave rise to the claimant's permanent disability occurred gradually and resulted, at least to a significant extent, from the effect of work-related wear and tear during the course of his coal mine employment. Medical causation is a matter for the medical experts and, therefore, the claimant cannot be expected to have self-diagnosed the cause of the harmful change to his cervical spine as being a gradual injury versus a specific traumatic event. He was not required to give notice that he had sustained a work-related gradual injury to his spine until his was informed of that fact [citations omitted].
>
> It is clear that the claimant was aware of symptoms in his cervical spine and associated the periodic flare-up of symptoms with his work long before being evaluated . . . and he also sought medical treatment after some specific incidents of cervical trauma. Furthermore, it is clear that the physicians who treated the claimant's symptoms over the years had encouraged him that the work was too stressful. Nonetheless, there is no indication that any of them ever informed him of his work-related gradual injury, i.e., that his work was gradually causing harmful changes to his spine that were permanent. Under those circumstances, we are not persuaded that the claimant was required to self-diagnose the cause of the cervical pain that contributed

> to his inability to work after February 11, 1998, as being such an injury.[15]

Therefore, although Williams reported to her workers' compensation carrier that she was experiencing pain in her hands and wrists, there was no medical evidence of bilateral carpal tunnel syndrome or any other work-related wrist or hand injury at that time. Williams was not diagnosed with carpal tunnel syndrome and informed that the condition was caused by her work until Dr. Premji did so in November 2003. Therefore, there was substantial evidence to support the ALJ's finding that the period of limitations began to run in November 2003, and the ALJ was not in error in determining that the claim was timely.

Because we conclude that the Board's well-written opinion by Chairman Gardner correctly addresses Charley's Headquarters's final arguments, we quote the pertinent parts of its opinion and adopt it as our own:

> The sum and substance of Charley's Headquarters arguments relates to its challenge of the ALJ's assessment of the cause of Williams' carpal tunnel syndrome. Charley's Headquarters is apparently distraught that an ALJ is free to choose the impairment rating of one physician while rejecting the causation opinion from that same physician, and asserts this "cherry picking" of evidence should not be tolerated. The crux of Charley's Headquarters' argument is an attack on the well-settled principle that an ALJ may choose to believe part of the evidence and

[15] Hill, 65 S.W.3d at 507.

disbelieve other portions of the evidence, whether the evidence came from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977); Brockway v. Rockwell International, 907 S.W.2d 166 (Ky.App. 1995).

As counsel for Charley's Headquarters is well aware, he made this same argument before the Kentucky Court of Appeals in Fairbanks Coal Co. v. Collins, 2003 WL 1227207 (Ky. App.) (rendered January 10, 2003 and designated not to be published). In Collins as here, the ALJ chose to rely on causation from one physician and the impairment rating from another physician. The court stated:

> Fairbanks also is of the opinion this Court should no longer allow ALJ's to 'cherry pick' from the evidence. Presumably Fairbanks is discussing the concept that it is within the authority of an ALJ/fact-finder to pick and choose from the evidence, including believing a part of a witness's testimony while disregarding other parts. Unfortunately for Fairbanks, this principle is firmly established by the court.[16] As it related to the issue of causation on the psychological disorder, the ALJ relied upon Drs. Breeding, Muckenhausen and Jain, and, while in assessing impairment, relied upon the impairment rating assessed by Dr. Shraberg. That was her right in accordance with Republic Steel Corp. v. Justice and Magic Coal Co. v. Fox. Whether we would have reached the same conclusion is irrelevant.

[16] "See Republic Steel Corp. v. Justice, Ky. 464 S.W.2d 267 (1971), and Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88 (2000)."

> However, the concept of picking portions of the evidence is not a fallacious as Fairbanks would want us to believe. The determination of causation involves a multitude of factors, even in the realm of medical causation. On the other hand, the assessment of an impairment rating, as was done by Dr. Shraberg, is merely a function of a medical provider analyzing the AMA Guides. Therefore, it was not, in our opinion, totally unreasonable for the ALJ to rely upon the causation testimony of Drs. Breeding, Muckenhausen and Jain, while at the same time relying upon the impairment rating assessed by Dr. Shraberg.

Here, we are satisfied Dr. Muckenhausen's opinion addressing causation constituted substantial evidence and the ALJ was free to rely on that portion of her opinion.

We also reject Charley's Headquarters' argument that the ALJ impermissibly shifted the burden of proof. As can be seen from the ALJ's analysis, he did nothing more than rely on medical evidence submitted by Williams to resolve the contested issue of work-relatedness and causation. The burden of proof was not shifted to Charley's Headquarters and its argument to the contrary is strained at best.

We further believe Charley's Headquarters' argument that the ALJ went outside the record to conclude Dr. DuBou's measurements of Williams' height and weight were incorrect is without merit. It was Dr. DuBou's opinion that Williams' carpal tunnel syndrome was not work-related and was due in part to her obesity. He recorded Williams' height at 5'5" and her weight at 165 pounds. The ALJ correctly noted, on reconsideration, that there was contrary evidence from Dr.

> Ghory contained in the record. Dr. Ghory recorded Williams was 5'9" and weighed 149 pounds.[17] Furthermore, Williams, at the final hearing, testified she was "almost 5-10" and weighed "146." The ALJ's observation that Williams was taller than him was not error.
>
> In support of its argument, Charley's Headquarters cites Newberg v. Price, 868 S.W.2d 841 (Ky. 1993), for the proposition that an ALJ is not authorized to substitute one physician's height measurement for that reported by another. Newberg v. Price, supra, is inapposite. That case involved a claim for coal workers' pneumoconiosis benefits and the level of benefits that are authorized based on spirometeric testing. Those tests require accurate height measurements in order to accurately measure a claimant's pulmonary function. Here, we are satisfied that a claimant's own testimony as to her height and weight constitutes competent evidence, especially in light of the fact that she was not cross-examined on this point. Further, her testimony was confirmed by Dr. Ghory's June 14, 2001 physical examination. We would also point out Dr. DuBou did not physically examine Williams, but only performed a records review. We are unable to discern the source of Dr. DuBou's information regarding Williams' height and weight.
>
> Finally, the Board is not inclined to disregard nearly 90 years of Kentucky jurisprudence and we summarily reject Charley's Headquarters' invitation to hold that the preponderance of evidence standard should apply to workers' compensation claims.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

[17] This Court would also point out that both Dr. Muckenhausen and Dr. Graulich examined Williams and noted her height as 5'9" and her weight at 146 pounds.

ALL CONCUR.

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