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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001736-WC

EARL'S BRAKE & ALIGNMENT — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-95520

TERRY MESSICK; HON. JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Earl's Brake & Alignment (Earl's Brake) petitions for the review of an opinion of the Workers' Compensation Board (Board) affirming a decision of an Administrative Law Judge (ALJ) awarding benefits to appellee Terry Messick. For the reasons stated hereafter, we affirm.

Messick, who was born in 1955, has an eighth-grade education and no specialized or vocational training. This matter stems from a work-related injury which Messick allegedly

suffered on February 9, 2004, while working for Earl's Brake.

The relevant evidence was summarized by the ALJ as follows:

> 2. The plaintiff testified that he has been a mechanic and has done flooring work before beginning employment with the defendant-employer as a mechanic on April 8, 1991. Plaintiff described his duties which involved using pneumatic tools, lifting fifty to sixty pounds and performing 90% of his work overhead. Plaintiff's medical history is significant for surgery on the ring finger on his left hand in 1995, hernias in 1990 and 1996 and an injury to the left index finger in 1998. Plaintiff previously had numbness in the small fingers of the right hand and treated with Dr. Broaddus on two occasions. Plaintiff also saw Dr. Railey on February 6, 2004 for tingling in the right upper extremity and he received anti-inflammatories. The plaintiff denied prior rotator cuff problems. He is left handed.
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> 3. The plaintiff claims an injury on Feb[r]uary 9, 2004 when he struck his right elbow and biceps area on the alignment rack. Plaintiff's arm was swollen and he finished his shift before going to the emergency room at Jewish Hospital. Plaintiff was taken off work and referred to Dr. Moskal. He remained off for two weeks and returned about February 20, 2004. Plaintiff has missed no work since. He has subsequently been diagnosed with a torn rotator cuff. Dr. Moskal has discussed surgery with him but none is planned presently. Plaintiff takes only over the counter medication and no prescriptions. Plaintiff stated that after a full day's work, he has pain in his right shoulder and he also indicated right shoulder problems while sleeping. Plaintiff continues to perform his regular duties for the defendant-employer and earns the same wage.

4. The medical records of Dr. Daniel Wolens were introduced into evidence on behalf of the plaintiff. The plaintiff was first seen on July 8, 2004 with complaints of right shoulder pain. The plaintiff was diagnosed with rotator cuff tear (supraspinatus) and rupture of the long head of the biceps tendon. Dr. Wolens stated the cause of plaintiff's diagnosis was degeneration of the biceps tendon and stated it was not possible to date the rotator cuff tear, which was found when performing the shoulder MRI. The plaintiff had performed heavy manual labor above shoulder level causing the underlying degeneration. The plaintiff does not have any motor loss or range of motion of the shoulder, therefore, there is no impairment for the rotator cuff. Dr. Wolens diagnosed a 3% impairment rating for plaintiff's biceps tendon rupture. The plaintiff has been able to return to his prior work unrestricted, but remains at risk for degenerative changes and tearing with continued overhead work. Dr. Wolens stated plaintiff's age and education would restrict him from other employment opportunities.

5. The medical records of Jefferson Medical Associates were introduced into evidence on behalf of the defendant-employer. The plaintiff underwent a physical on April 5, 2001 with complaints of right shoulder pain and upper arm pain with numbness in the pinky finger. The plaintiff was placed on medication with a follow-up appointment. The plaintiff was seen again on May 4, 2001 with some improvement and continued numbness in the fifth finger. The plaintiff returned on August 2, 2001 with some improvement.

6. The medical records of Dr. Michael J. Moskal were introduced into evidence on behalf of the defendant-employer. The plaintiff was first seen in February, 2004. Dr. Moskal diagnosed the plaintiff with a biceps tendon rupture and rotator cuff tear. He found significant degenerative changes of

> the supraspinatus upon examination. A MRI was performed revealing a long head biceps tendon rupture with associated edema and swelling. In a note dated February 20, 2004, Dr. Moskal stated plaintiff would be returning to work on unrestricted duty and check his progress. He stated if shoulder weakness occurred another MRI would be needed. Dr. Moskal did not recommend surgery for the biceps tendon rupture and stated that he could not relate his condition to the event that occurred at work. He found the condition to be an age related problem, not due to work.
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> 7. The medical records of Dr. Mark O. Gladstein were introduced into evidence on behalf of the defendant-employer. The plaintiff underwent an independent medical evaluation on November 29, 2004. The plaintiff stated that he did not believe the bumping of the arm caused the tear of the long head of the biceps tendon and Dr. Gladstein agreed. Dr. Gladstein noted that rotator cuff tears and biceps tendon ruptures go hand and hand, due to their degeneration in nature. Upon examination, Dr. Gladstein saw the muscle twitch in the distal right arm with no signs of weakness in the shoulder. X-rays of the shoulder were performed revealing no bony abnormalities. Dr. Gladstein stated the cause of plaintiff's complaints was not work-related, but due to degeneration. He recommended a rotator cuff repair surgery and found the workers compensation carrier would not be responsible. Further, he found the plaintiff's biceps tendon should not be surgically repaired. He found the plaintiff had no impairment using the AMA Guide and had returned to work performing his prior job with no difficulties.

After considering all of the evidence, the ALJ found that Dr. Wolens' opinion was the most credible evidence adduced

as to causation. The ALJ found that Dr. Wolens "connected" the February 9 incident to the injury of Messick's biceps tendon, which already was degenerated. Further, the ALJ found that Dr. Wolens believed that Messick's work history, involving the performance of heavy manual labor above his shoulders, was sufficient to cause the tear of his rotator cuff. The ALJ awarded benefits based on Dr. Wolens' impairment rating of 3%. The Board affirmed the ALJ's decision, and this petition for review followed.

Earl's Brake asserts that substantial evidence[1] does not support the ALJ's decision as to causation, as the ALJ merely relied on Dr. Wolens' report to "connect" the February 9 incident and Messick's biceps tendon injury without finding that there was a reasonable medical probability of causation. We disagree.

Dr. Wolens' report included his conclusion that Messick had two interrelated problems:

> The first is that of a rupture of the long head of the biceps. This would not occur solely due to a contusion of the lateral aspect of the arm. Bicep[s] tendon tears generally occur due to lifting and elbow flexion and/or supination. The underlying cause of all bicep[s] tendon ruptures is degeneration of the bicep[s] tendon. When the bicep[s] tendon has reached its limit of function, any amount of stress to the bicep[s] tendon will precipitate the tear.

[1] *Wolf Creek Collieries v. Crum,* 673 S.W.2d 735, 735 (Ky.App. 1984).

The same argument would be offered for a tear of the rotator cuff. The MRI is quite clear that there is degenerative change of the cuff which again is the underlying cause of his condition. Yet too, when ready to tear, this occurrence will result from even small amounts of physiological stress. Specifically in terms of the bicep[s] tendon rupture, Mr. Messick reports pain and the bicep[s] deformity to have occurred acutely on February 9, 2004. As his tissues are degenerative, his final tear may have been precipitated at that moment irrespective of the degree of trauma that was incurred. The tendon, however, would have already had to have been quite fragile for the onset to have occurred given the situation as described.

In terms of the rotator cuff tear, it is not possible to time or date its onset. The discovery of the rotator cuff tear (supraspinatus) was an incidental finding at the time of shoulder MRI. That is, the shoulder MRI was obtained by Dr. Moskal, due to the frequent statistical association between bicep[s] tendon tears and rotator cuff tears. The patient did not present at the time of Dr. Moskal's first evaluation with clear evidence of rotator cuff pathology. It is again, therefore, not possible to date the onset of the rotator cuff tear.

What is important to understand in Mr. Messick's case, however, is that this individual has an extensive history of heavy manual labor performed above shoulder level. This is one of those few instances in the scientific literature in which there is fairly good ergonomic data that would allow one to conclude that such activities increase the rate of degenerative change within those tissues that are required for elevation, abduction, and external rotation of the shoulder. This would include the long head of the bicep[s] tendon where it

> inserts on to the labrum and humeral head as well as the rotator cuff muscles. Therefore, although this individual did not experience acute trauma to the bicep[s] tendon or the rotator cuff on 2/9/04, his underlying degenerative change is likely to be associated with his extensive employment requiring heavy manual labor performed above shoulder level.

As a whole, Dr. Wolens' report clearly indicates that he believed that Messick's injuries resulted from degenerative changes which were "likely to be associated with his extensive employment requiring heavy manual labor performed above shoulder level," and that the biceps tendon rupture could have occurred on February 9 even without any additional trauma. Further, although the February 9 incident alone would not have caused the injury to a healthy biceps tendon, Dr. Wolens' report clearly tied the degeneration of the tendon not only to cumulative trauma[2] associated with Messick's long term employment, but also to the February 9 trauma. Thus, we are not persuaded by Earl's Brake's characterization of the evidence and argument that Dr. Wolens' testimony failed to prove causation by reasonable medical probability rather than by mere possibility. It follows that Earl's Brake's argument, that substantial evidence does not support the ALJ's findings as to causation, must fail.

Finally, we are not persuaded by Earl's Brake's assertion that Messick failed to timely file a claim pertaining

[2] *See* KRS 342.0011(1).

to his rotator cuff injury. Although the evidence shows that Messick asked a doctor as early as May 2001 whether his right shoulder pain might be caused by a job-related muscle strain, there is nothing in the record to indicate that Messick was advised at any time prior to July 2004 that he had a cumulative work-related shoulder condition that might support a compensable claim. Clearly, Messick was not required to self-diagnose such a condition,[3] and the October 2004 amendment of his claim to include the rotator cuff injury was well within the applicable two-year statute of limitations.[4]

The Board's opinion, affirming the opinion and award of the ALJ, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brian T. Gannon
Louisville, Kentucky

BRIEF FOR APPELLEE TERRY MESSICK:

Mark C. Webster
Jeffersonville, Indiana

[3] *Hill v. Sextet Mining Corporation,* 65 S.W.3d 503 (Ky. 2001).

[4] *See* KRS 342.185. *See also American Printing House for the Blind v. Brown,* 142 S.W.3d 145 (Ky. 2004).