

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000873-WC

UNITED PARCEL SERVICE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-95658

CAROLYN MARTIN;
HON. MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: KELLER AND TAYLOR, JUDGES; HENRY,¹ SENIOR JUDGE.

KELLER, JUDGE: United Parcel Service (UPS) appeals from the Opinion of the Workers' Compensation Board (the Board) affirming the Administrative Law Judge's (ALJ) decision awarding Carolyn Martin (Martin) medical expense benefits. UPS argues on appeal that Martin did not file her claim within the applicable statutory period; that the

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

medical opinion on which the ALJ relied was not stated within the realm of reasonable medical probability; and that an award of future medical expense benefits is not proper when there has been no finding of a permanent impairment rating or permanent disability. For the reasons set forth below, we affirm.

FACTS

Martin filed an Application for Resolution of Injury Claim on March 10, 2005, alleging work-related repetitive injuries to her wrists from July 18, 2002, through January 6, 2005. The parties stipulated that Martin received temporary total disability benefits from October 20, 2002, through February 16, 2003.

In support of her claim, Martin filed medical records from Dr. Geoffrey Durham-Smith, who performed right carpal tunnel surgery on November 14, 2002, and left carpal tunnel surgery on December 24, 2002. In a report dated May 26, 2005, Dr. Durham-Smith listed diagnoses of median and ulnar nerve compression "most probably secondary to tendinitis in the wrists . . . with some residual intermittent tendinitis." He stated that Martin had reached maximum medical improvement, had no impairment rating, and should avoid "prolonged repetitive keying tasks." Dr. Durham-Smith did not directly address whether Martin's conditions were related to her work at UPS.

Martin also filed medical records from Dr. Kenneth Beilman. In pertinent part, Dr. Beilman's records reflect as follows: January 4, 2005, office note states as follows: (1) on April 29, 2003, Dr. Bielman stated that Martin had "[t]endinitis of hands, likely related to repetitive keying at work"; (2) on July 22, 2003, Dr. Beilman "[a]dvised

patient to look for another job where she does not have to do so much repetitive motions with her wrists"; (3) on September 16, 2003, Dr. Beilman noted that Martin had "some residual symptoms made worse by repetitive injuries that the patient is fully aware of"; (4) on November 9, 2004, Dr. Beilman noted that Martin was "[s]till wearing the wrist splints because of the data entry she has to do"; and (5) on January 4, 2005, Dr. Beilman stated that Martin's "[o]ngoing symptoms [are] secondary to the nature of her job."

UPS filed the report of Dr. Michael Moskul. Dr. Moskul's examination revealed bilateral loss of strength, pain behaviors with range of motion testing, tenderness, and negative Tinel's and Phalen's tests. Following his examination and review of Martin's medical records, Dr. Moskul made diagnoses of idiopathic pain of the bilateral upper extremities with no evidence that Martin had ever suffered from carpal tunnel syndrome. Dr. Moskul stated that he could not determine the rationale for performing surgery; however, he had not reviewed Dr. Durham-Smith's records. Finally, Dr. Moskul stated that Martin's complaints were not related to "her vocational exposure," that she did not require any further treatment, that she had no impairment, and that she had no restrictions.

With regard to its statute of limitations defense, UPS filed correspondence from the then-Department of Workers' Claims (the DWC) stating that temporary total disability benefits had been terminated on February 16, 2003. Furthermore, the letter advised Martin that "within two years after the last voluntary payment of income benefits" (emphasis in original) she had to file an Application for Resolution of Claim or

any claim she had would be barred. Martin filed a check stub from the workers' compensation carrier dated March 21, 2003, representing payment of temporary total disability benefits from August 22, 2002, through October 29, 2002.

Martin testified that she worked primarily entering data into computers. On July 18, 2002, Martin's pain was such that she could not continue working. Following a course of conservative care, Martin underwent right wrist surgery in November of 2002 and left wrist surgery in December of 2002. Martin was off work from August 22, 2002, through February 17, 2003, during which time she received short-term disability and temporary total disability benefits. Martin went off work again on January 28, 2005, because of pain in her hands. At that time, Martin's hand surgeon advised her that she could not return to work doing data entry. United Parcel Service (UPS) did not pay Martin any income benefits following the alleged January 28, 2005, injury.

With this factual background in mind, we will address the issues raised by UPS in turn.

STANDARD OF REVIEW

A reviewing court must give great deference to the conclusions of the fact-finder on factual questions if supported by substantial evidence and the opposite result is not compelled. When considering questions of law, or mixed questions of law and fact, the reviewing court has greater latitude to determine whether the findings below were sustained by evidence of probative value.

Uninsured Employers' Fund v. Garland, 805 S.W.2d 116, 117 (Ky. 1991). The issues raised by UPS are questions of law and/or mixed questions of law and fact; therefore, we

will undertake a *de novo* review. See *A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc.*, 998 S.W.2d 505, 509 (Ky.App. 1999).

ANALYSIS

A. Statute of Limitations

KRS 342.185(1) provides, in pertinent part, that a claimant is required to file a claim within two years of the date of the accident or, if voluntary income benefits are paid, "within two (2) years following the suspension of [those] payments." It is undisputed that UPS notified the DWC that it terminated temporary disability benefit payments as of February 16, 2003. It is also undisputed that, after notifying the DWC, UPS sent a temporary total disability check for past due benefits to Martin on March 21, 2003. Finally, it is undisputed that Martin did not file her claim until March 10, 2005, more than two years after UPS notified the DWC that it had terminated benefits but less than two years after UPS made its last payment. Therefore, the question before us is, what constitutes "suspension" of temporary total disability benefits, the carrier's notice to the DWC that it has terminated benefits or the date the last payment is actually made?

UPS argues that the date of "suspension" is the date Martin's entitlement to temporary total disability ended, not the date the check was issued. In this case, Martin's temporary total disability ended on or about February 16, 2003. As noted by the Board, the Supreme Court of Kentucky addressed this issue in *Transcraft Corp. v. Lovely*, 2004-SC-0145-WC, 2005 WL 119746 (Ky.). In *Lovely*, Transcraft's workers' compensation carrier notified the DWC that it had terminated payment of TTD benefits, and the DWC

sent a letter to Lovely notifying him of his statutory filing period. Sometime later, the carrier sent an additional TTD benefit check to Lovely, explaining that it had previously paid at the incorrect rate and that the additional TTD check represented payment designed to cure that deficiency. The carrier then notified the DWC of this additional payment and the DWC sent a letter to Lovely notifying him of his statutory filing period, using the date benefits were terminated rather than the date of the last benefit check. Lovely filed his claim within two years of the date of the last check, but not within two years of the date benefits were terminated.

The ALJ found that Lovely timely filed his claim because it was filed within two years of the date of the last TTD payment. The Board, this Court, and the Supreme Court affirmed the ALJ. In affirming, the Supreme Court noted that "[a] pertinent definition of the term 'suspend' is found in *Webster's New Collegiate Dictionary* 1174 (1975). That is, 'to stop payment or fail to meet obligations.'" Considering that definition, the Supreme Court concluded that:

KRS 342.185(1) runs the period of limitations for a period of two years after the employer stops paying voluntary income benefits, *i.e.* for two years after it makes the final payment. This construction is consistent with both the purpose of the provision and its plain language.

We discern no reason to disagree with the Supreme Court's holding in *Lovely*; therefore, since Martin filed her claim within two years of the date of the last TTD payment, we affirm the ALJ's finding that Martin timely filed her claim.

B. Sufficiency of Medical Evidence

UPS argues that Martin did not submit any medical evidence to support her contention that her condition is work related and that the evidence Martin did offer is not expressed within the realm of reasonable medical probability. We will address whether Martin offered any evidence of causation first.

“The claimant in a workman's compensation case has the burden of proof and the risk of persuading the board in his favor.” *Snawder v. Stice*, 576 S.W.2d 276, 279 (Ky.App. 1979). In order to meet his burden, a claimant must produce evidence that has sufficient probative value to induce conviction in the minds of reasonable persons. *Blankenship v. Lloyd Blankenship Coal Co., Inc.*, 463 S.W.2d 62, 64 (Ky. 1970).

As noted above, Dr. Bielman states in his medical records, a number of times, that Martin's condition is related to her work activity. Therefore, UPS's argument that Martin did not put forth any medical evidence of causation is without merit. Furthermore, Dr. Bielman's statement on January 4, 2005, that Martin's "[o]ngoing symptoms [are] secondary to the nature of her job;" his September 16, 2003, statement that Martin's residual symptoms were "made worse by repetitive injuries;" and his April 29, 2003, statement that Martin had "[t]endinitis of hands, likely related to repetitive keying at work" constitute evidence of substance sufficient to support Martin's claim.

As to whether Martin's proof fails because none of the medical opinions are expressed within the realm of reasonable medical probability, we note that

"medical-opinion evidence [must] be founded on probability and not on mere possibility or speculation." However, "the realities of the problem of semantics must be taken into account." While "speculative viewpoints must be rejected . . . substance should prevail over form, and the expert's testimony should be examined in its total meaning, rather than word-by-word." *Young v. L. A. Davidson, Inc.*, 463 S.W.2d 924, 926 (Ky. 1971).

Taking the preceding into account, and looking at the totality of Dr. Beilman's records, we hold that Dr. Beilman's opinions regarding causation were stated with sufficient certainty to pass muster. Therefore, we affirm the findings of the ALJ and the Board in that regard.

C. Future Medical Expenses

Despite her finding that Martin had no permanent impairment rating and thus no permanent disability, the ALJ awarded Martin ongoing medical expense benefits. UPS argues that such an award, absent a finding of a permanent impairment rating or of permanent disability is contrary to the plain meaning of KRS Chapter 342. As noted by the Board, the Supreme Court of Kentucky held otherwise in *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313 (Ky. 2007). As the Supreme Court stated in *Williams*:

Mindful of the relationship between impairment and disability under the 1996 Act, we conclude that disability exists for the purposes of KRS 342.020(1) for so long as a work-related injury causes impairment, regardless of whether the impairment rises to a level that it warrants a permanent impairment rating, permanent disability rating, or permanent income benefits.

Williams, at 318-319.

Martin suffered a work-related injury that required surgery. She continues to be symptomatic following that surgery and medical evidence presented to the ALJ indicates that additional medical treatment will be required. Therefore, the ALJ's award of ongoing medical expenses is supported by the evidence and the Supreme Court's holding in *Williams*. Thus, we discern no error in the ALJ's opinion awarding Martin ongoing medical expenses nor in the opinion of the Board affirming the ALJ.

CONCLUSION

For the reasons set forth above, we hold that the ALJ's findings that Martin timely filed her claim; that Martin's condition is related to her work for UPS; and that Martin is entitled to ongoing medical expense benefits are supported by both the evidence and the law. Therefore, we affirm the decision of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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