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Commonwealth Of Kentucky

Court of Appeals

NO. 2016-CA-001008-WC

FORD MOTOR COMPANY (LAP) APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-13-01225

ERIC L. TURNER;
HON. THOMAS J. POLITES,
ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION
BOARD APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: COMBS, STUMBO AND THOMPSON, JUDGES.

COMBS, JUDGE: This case is an appeal by an employer from a decision of the Workers' Compensation Board. Appellee, Eric L. Turner, claimed to have

suffered repetitive upper extremity injuries while he was employed by the Appellant, Ford Motor Company (LAP). Ford contends that the Workers' Compensation Board (the Board) erred in affirming the following conclusions of the Administrative Law Judge (the ALJ): (1) that Turner's cubital tunnel injury was work-related; (2) that Turner was entitled to temporary total disability benefits while on light duty; and (3) that Turner had a 7% impairment. After our review, we affirm in part, reverse in part, and remand.

On August 9, 2013, Turner filed an Application for Resolution of Injury Claim (Form 101), alleging that on September 27, 2012, he sustained injury to both upper extremities as a result of his repetitive job duties.

On October 28, 2013, Turner testified by deposition. He began working for Ford in 1996 -- at first in Virginia and later in Missouri. In February 2012, Turner began working at Ford's plant in Louisville, Kentucky. Initially, he did paint repair. In August 2012, he drove a forklift for a week. In early September, Turner was put on a job in the trim department. He ran a wire on the floor pan of the driver's side of vehicles requiring that he push in wire at various locations with his thumb. After two or three weeks on that job, Turner began having symptoms. He experienced pain, numbness, and tingling. His right hand manifested the symptoms first. Turner first reported his injury on September 27, 2012. He was treated at Ford's medical department, which ultimately referred him to Dr. Tsai.

Turner remained on the wire job until January 2013. He switched to a hub knuckle job, which involved putting pieces into a machine which builds a part, and then placing it on a rack. Turner performed that job until he underwent surgery on Friday, March 8, 2013. He returned to work the following Monday on an inspector job, which he performed until the company's shutdown vacation in July 2013.

Turner was deposed again on July 23, 2015. Prior to that deposition, on March 5, 2015, Dr. Tsai had performed a right cubital tunnel release. That procedure was submitted under Turner's health insurance. Dr. Tsai released him to return to work on March 22, 2015. At the time of his deposition, Turner was working on a strut job. He presently works 40 hours per week; his rate of pay has not changed since the injury date.

At a hearing on November 12, 2015, the parties stipulated an average weekly wage of $1,377.20. After his March 2013 surgery, Turner missed only one day of work. He was assigned to light duty after that, which included sweeping or putting dots on engines with a marker. Sometimes he was doubled up with someone else on a job on the line. Turner received his normal wages while on light duty.

Ford filed Dr. Tsai's records as evidence. Turner was first seen on December 4, 2012, after a nerve conduction study (EMG) was positive for carpal tunnel. Exam also showed pronator teres compression. A work status/physical capabilities form reflected a diagnosis that Turner had bilateral carpal tunnel as well as multiple nerve compressions and that he was to start therapy. On March 8,

2013, Dr. Tsai performed right carpal tunnel and pronator teres releases. After the surgery, Dr. Tsai released Turner to primarily one-handed duty.

Dr. Tsai's April 18, 2013 office record reflected diagnoses of: carpal tunnel syndrome; median nerve compression/ pronator teres syndrome; and lesion ulnar nerve/cubital tunnel syndrome Guyon's canal. On that date, Turner was released to light work. Turner returned for a follow-up on May 16, 2013, when he was released to medium work. Dr. Tsai's records reflected that Turner was seen in follow-up through October 10, 2013, when he was placed back on light duty. Patient history reflected that Turner's pain was aggravated by doing more than medium duty at work and that he was wearing an elbow brace.

Turner filed Dr. Byrd's reports as evidence. Dr. Byrd first saw Turner on December 5, 2013, for an evaluation of impairment rating. As noted above, Turner had undergone right carpal tunnel and pronator teres releases by Dr. Tsai. Dr. Byrd's assessment was: 1) history of pronator teres syndrome; 2) history of carpal tunnel syndrome; and 3) probable ulnar neuropathy at the elbow. Dr. Byrd explained that Turner was not at Maximum Medical Improvement (MMI) because he had not had a complete work-up and treatment for neuropathy at the elbow. Dr. Byrd opined that Turner's "carpal tunnel syndrome was caused by his repetitive activity at work that included frequent flexion, extension and twisting of his wrist. He describes symptoms that are consistent with an ulnar neuropathy as well."

By addendum dated July 9, 2015, Dr. Byrd stated as follows:

> Mr. Turner was evaluated for an impairment rating by me on 12/05/13. At that time, I was concerned about him [*sic*] having problems associated with an ulnar neuropathy of his right elbow from repetitive work. He was frequently flexing and extending his elbow, and I did not believe him to be at MMI. For various reasons, his ulnar nerve surgery was delayed until March of 2015 and performed by Dr. Desai [*sic*]. He tolerated this procedure well. He reports only occasional paresthesias involving his right hand that primarily occur at night. He is status post pronator teres syndrome, status post carpal tunnel syndrome with release performed on 03/18/13, and ulnar nerve transposition performed in March of 2015.

Based upon the findings of his examination, Dr. Byrd assigned 7% whole person impairment attributable to the right upper extremity based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (5th Ed. AMA Guides).

Ford filed Dr. DuBou's reports as evidence. Dr. DuBou saw Turner for an Independent Medical Exam (IME) on October 29, 2013, and diagnosed status post right carpal tunnel, right pronator release, and "relatively new" right carpal tunnel. In Dr. DuBou's opinion, the "cubital tunnel syndrome ….has nothing to do with work." Dr. DuBou included various medical articles supporting the proposition "that cubital tunnel syndrome is not associated with work with the possible exception of holding a tool in position." Dr. DuBou noted that Turner had only been on light duty since the original surgery. Dr. DuBou assigned 2% impairment whole person, 5th Ed. AMA Guides, based upon persistent carpal tunnel findings on his EMG.

Ford filed additional reports from Dr. DuBou dated December 26, 2013; January 21, 2014; and March 9, 2014, all of which reiterated his opinion that the cubital tunnel syndrome is not related to work.

On August 6, 2015, Dr. DuBou saw Turner for an updated IME. He diagnosed status post right carpal tunnel release and right pronator release. Dr. DuBou stated that "[t]he carpal tunnel release is related to work, the cubital tunnel is not related to work, and the relationship to pronator to work is still being discussed by hand surgeons." He assigned 2% impairment whole person based upon right carpal tunnel residual, 5th Ed. AMA Guides.

By report dated September 22, 2015, Dr. DuBou explained that he had reviewed Dr. Byrd's report. Dr. DuBou agreed with Dr. Byrd that the right carpal tunnel syndrome was caused by the work at Ford and that "in all likelihood if anything could cause a pronator compression, the work at Ford would be the kind of work that would do so." However, Dr. DuBou disagreed with Dr. Byrd that the cubital tunnel syndrome was work related.

By Opinion and Award rendered January 11, 2016, the ALJ concluded that Turner sustained compensable injuries -- including an injury to the ulnar nerve (the cubital tunnel syndrome). At page 10, the ALJ explained that he inferred from Dr. Byrd's statements that the ulnar condition was work-related. "Dr. Byrd clearly cited to Plaintiff's history of repetitive work including flexion and extension of the elbow which he suspected was causing ulnar neuropathy." The ALJ was also persuaded by the fact that Turner had undergone ulnar transposition surgery, which

confirmed Dr. Byrd's suspicion of ulnar neuropathy; furthermore, Dr. Tsai's records documented symptoms in the context of work activities. The ALJ awarded PPD benefits based upon Dr. Byrd's 7% rating. He dismissed the upper left extremity claim because there was no evidence of permanent impairment in that regard.

The ALJ cited *Central Kentucky Steel v. Wise,* 19 S.W.3d 657 (Ky. 2000), and *Magellan Behavioral Health v. Helms,* 140 S.W.3d 579 (Ky. App. 2004), for the proposition that TTD benefits are appropriate where an employee remains disabled from his customary work. The ALJ awarded TTD benefits from March 8, 2013, to July 15, 2013. During that period, Turner was performing the light-duty inspector position, which the ALJ concluded was not sufficiently similar to his pre-injury work activities. The ALJ also awarded TTD benefits for two weeks after the cubital tunnel surgery from March 15, 2015, to April 1, 2015.

Ford and Turner filed Petitions for Reconsideration, both of which the ALJ denied by Order rendered on February 17, 2016.

Ford and Turner appealed to the Workers' Compensation Board. On appeal, Ford argued that the ALJ erred: (1) in finding that the cubital tunnel syndrome was work-related, (2) in awarding TTD benefits when Turner was on light duty, and (3) in awarding PPD benefits based upon Dr. Byrd's 7% impairment rating. Turner argued that he was entitled to additional TTD benefits.

By Opinion rendered June 17, 2016, the Board affirmed. The Board concluded that the ALJ had provided sufficient explanation for his determination

that the cubital tunnel syndrome was work-related and that his conclusion was supported by the record. The Board also found that the ALJ did not err in awarding benefits based upon Dr. Byrd's 7% impairment rating. Finally, the Board affirmed the award of TTD benefits. The Board cited at length from *Trane Commercial Systems v. Tipton,* 481 S.W.3d 800 (Ky. 2016), which holds that "absent extraordinary circumstances, an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment … *and* has actually returned to employment." *Id.* at 807 (italics original). Although *Tipton* was decided *after* the ALJ rendered his decision, the Board concluded that the ALJ had correctly addressed the issue.

On July 15, 2016, Ford timely filed a Petition for Review to this Court. Turner has not appealed.

Ford argues that that Dr. Byrd did not express an opinion as to causation in his report and that the ALJ's finding that the cubital tunnel syndrome is work-related is not supported by substantial evidence. It is indeed well settled that "the claimant in a workers' compensation proceeding bears the burden of proving each of the essential elements of any cause of action, including causation." *Miller v. Go Hire Employment Dev., Inc*., 473 S.W.3d 621, 628 (Ky. App. 2015). Where, as in this case, the claimant succeeds in his burden of proof and the adverse party appeals, the standard of review is whether the ALJ's decision is supported by substantial evidence. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984).

Ford relies upon *Mengel v. Hawaiian-Tropic Nw. & Cent. Distributors, Inc*., 618 S.W.2d 184 (Ky. App. 1981). In *Mengel,* the disputed issue was whether the claimant's ruptured disc was caused by a work-related injury or by a subsequent slip on ice. One physician testified that it was possible that the work injury contributed to the disc problem; another thought it was a contributing factor. There was no other medical opinion. The old Board dismissed the claim, concluding that the slip on ice caused the problem and essentially wholly ignoring the medical testimony about the work-relatedness of the injury. In reversing, this Court held as follows:

> [W]hen the question is one properly within the province of medical experts, the [factfinder] is not justified in disregarding the medical evidence. See 3 Larson, supra, s 79.54. Especially in this case, where the causal relationship is not apparent to the layman and where there has been a lapse of time between the initial trauma and the … operation, we think that the [old] board's decision, based on its own observations and contrary to the medical evidence, was improper.

Id. at 187.

We believe that *Mengel* is distinguishable from the case before us. The ALJ did not base his decision upon his **own** observations. Instead, he relied upon the opinion of Dr. Byrd, who believed that Turner was having problems associated with an ulnar neuropathy of his right elbow *from repetitive work*. The ALJ also relied upon Dr. Tsai's records indicating symptoms associated with work activity, which the ALJ believed supported Dr. Byrd's opinion that there was a

causal connection. "[T]he ALJ, as fact-finder, has the sole authority to judge the weight, credibility and inferences to be drawn from the record." *Miller v. E. Kentucky Beverage/Pepsico, Inc.,* 951 S.W.2d 329, 331 (Ky. 1997).

At page 18 of its Petition for Review, Ford argues that "Dr. Byrd's opinion cannot be stretched to be interpreted that he believed, to a reasonable medical probability, that the cubital tunnel syndrome was work-related." However, Dr. DuBou, Ford's medical expert, interpreted Dr. Byrd's report as establishing a causal connection. In his September 22, 2015 report, Dr. DuBou explained that he had reviewed Dr. Byrd's report and that he "would thus disagree with Dr. Byrd that the cubital tunnel is related in any way to [Turner's] work."

On the issue of medical causation in the context of workers' compensation, Kentucky law holds as follows:

> Medical causation must be proved to a reasonable medical probability with expert medical testimony but KRS 342.0011(1)[1]does not require it to be proved with objective medical findings. 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. **Where there is conflicting medical testimony concerning the cause of a harmful change, it is for the ALJ to weigh the evidence and decide which opinion is the most credible and reliable.** While the existence of peer-reviewed articles and research studies that support a particular view of causation are factors

[1] KRS 342.0011(1) provides in relevant part that: "'Injury' means any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings."

> that an ALJ may consider, they are not required and will not necessarily compel a particular result.

Brown-Forman Corp. v. Upchurch, 127 S.W.3d 615, 621 (Ky. 2004) (internal citations omitted)(emphasis added.)

It is not our province or prerogative to indulge in second-guessing the Board. In *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992), the Supreme Court explained that:

> The [Board] is suppose[d] to decide whether the evidence is sufficient to support a particular finding made by the ALJ, or whether such evidence as there was before the ALJ should be viewed as uncontradicted and compelling a different result. These are judgment calls. No purpose is served by second-guessing such judgment calls, let alone third-guessing them…. The function of further review of the [Board] in the Court of Appeals is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.

Id. at 687-88. We cannot say that the Board committed an error in assessing the evidence so flagrant as to cause gross injustice. It properly exercised its prerogative to assess the evidence before it and to draw its conclusion that that evidence sufficiently supported the finding of the ALJ. Accordingly, we affirm on this issue.

Ford also contends that Dr. Byrd's 7% impairment rating is invalid because it includes impairment for ulnar neuropathy/cubital tunnel syndrome which, it has argued, is not work-related. This issue, however, is moot, in light of our

conclusion that the Board did not err in affirming the ALJ's determination that the cubital tunnel syndrome **is** work-related.

Ford's remaining argument is that the ALJ erred in awarding TTD benefits from March 8, 2013 – July 15, 2013. Ford cites *Trane Commercial Sys. v. Tipton*, 481 S.W.3d 800, 807 (Ky. 2016), which was decided after the ALJ rendered his decision. In *Tipton,* our Supreme Court addressed the issue of TTD benefits where a claimant has returned to work without having reached MMI:

> We take this opportunity … to clarify what standards the ALJs should apply to determine if an employee "has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a)[2]. Initially, we reiterate that "[**t]he purpose for awarding income benefits such as TTD is to compensate workers for income that is lost due to an injury, thereby enabling them to provide the necessities of life for themselves and their dependents**." [*Double L Const., Inc. v. Mitchell*, 182 S.W.3d 509, 514 (Ky. 2005)]. Next, we note that, once an injured employee reaches MMI that employee is no longer entitled to TTD benefits. **Therefore, the following only applies to those employees who have not reached MMI but who have reached a level of improvement sufficient to permit a return to employment.**
>
> As we have previously held, "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type [of work] that is customary or that he was performing at the time of his injury." *Central Kentucky Steel v. Wise,* 19 S.W.3d at 659. However, it is also not reasonable, and it does not further the purpose for paying income benefits, to pay TTD benefits to an

[2] KRS 342.0011(11)(a) defines "'Temporary total disability' [as] the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment[.]"

> injured employee who has returned to employment simply because the work differs from what she performed at the time of injury. **Therefore, absent extraordinary circumstances, an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment, *i.e.* work within her physical restrictions and for which she has the experience, training, and education; *and* the employee has actually returned to employment**. We do not attempt to foresee what extraordinary circumstances might justify an award of TTD benefits to an employee who has returned to employment under those circumstances; however, **in making any such award, an ALJ must take into consideration the purpose for paying income benefits and set forth specific evidence-based reasons why an award of TTD benefits in addition to the employee's wages would forward that purpose.**

Id. at 807 (italics original, boldface emphasis added).

Ford contends that Turner's light-duty inspector job was a legitimate job which benefited Ford and did not require additional training to perform. It is uncontroverted that Turner was paid his regular wages while on light duty. Ford argues that Turner was not entitled to TTD during this time because his situation did not constitute the "extraordinary circumstance" contemplated by *Tipton.* Thus, Ford argues that at a minimum, the case should be remanded to the ALJ.

We agree that remand on this issue is appropriate. *See Toyota Motor Mfg., Kentucky, Inc. v. Tudor*, 491 S.W.3d 496, 504 (Ky. 2016) (After ALJ rendered opinion awarding TTD during period claimant was on restricted duty, the

decision in *Tipton* was rendered. "Because the ALJ could not have considered [*Tipton*] factors, this matter is remanded to the ALJ for that consideration.").

We reverse the award of TTD benefits for the period March 8, 2013, to July 15, 2013, and we remand with the instruction that the ALJ specifically consider the *Tipton* factors in determining whether or not Turner is entitled to TTD benefits during the period from March 8, 2013, to July 15, 2013.

Accordingly, the June 16, 2016, Opinion of the Workers' Compensation Board is hereby affirmed in part, and reversed in part, and remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

George T. T. Kitchen, III
Louisville, Kentucky

BRIEF FOR APPELLEE:

Ched Jennings
Louisville, Kentucky