RENDERED: SEPTEMBER 1, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000580-WC

CHERYL NICHOLS — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-96-75839

FISCHER PACKING COMPANY;
SPECIAL FUND;
HONORABLE THOMAS A. NANNEY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, EMBERTON AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Cheryl A. Nichols (Nichols) appeals from an opinion of the Workers' Compensation Board (the Board) entered February 4, 2000, which affirmed an opinion of the Administrative Law Judge (ALJ) entered August 12, 1999, which denied Nichols's

claim for income benefits for a cervical spine injury.[1] We affirm.

Nichols was employed by Fischer Packing Company (Fischer) as a quality assurance controller. On September 23, 1996, she caught her foot on a floor pallet and fell. Nichols reported the accident to her supervisor, Garry Bork, on September 25, 1996, and to the company nurse on October 1, 1996. On all of the accident reports, Nichols indicated that when she fell she hit her lower back on the floor pallet. Nichols's application for benefits was filed on December 12, 1996. Under "nature of the injury," Nichols stated "I incurred a herniated disk [sic], a broken disk [sic], two protruding disks [sic], and nerve damage to my lower back."

Although the initial forms pertaining to Nichols's accident and injuries relate to the occurrence of a lower back injury, Nichols testified at her deposition that when she fell she hit not only her lower back but also her head. Nichols stated that she told Bork she hit her head, but she did not indicate as such on the accident forms because she was more concerned about her back.[2] She further testified that following the accident she had pain in her lower back and a headache which lasted several days. Nichols stated that she attempted to return to work at Fischer on October 6, 1997, but could only work 2 ½

[1]Although the ALJ denied benefits for the cervical spine injury, he did award benefits based on a 40% occupational disability rating for a lumbar spine injury resulting from the same work-related accident. As neither party has appealed from that portion of the award, we see no need to address Nichols's lumbar spine injury any further.

[2]Bork testified at his deposition that Nichols told him she fell and hit her lower back.

days. According to Nichols, she started having tremors at work on October 9, 1997. She denied having tremors prior to that date. Nichols testified that she told Dr. John Guarnaschelli (Dr. Guarnaschelli), her treating physician, that she was having pain between her shoulder blades but he never did anything for it. She indicated that this pain began in December 1996.

Nichols filed medical records and a Form 107 from Dr. Guarnaschelli into the record. According to Dr. Guarnaschelli's office notes, he began treating Nichols on October 9, 1996. From that date through October 16, 1997, it appears that Dr. Guarnaschelli treated Nichols for lower back problems only as there is no mention of cervical spine problems on the office notes for this time period. However, on November 11, 1997, Dr. Guarnaschelli noted that Nichols had a:

> multiple constellation of signs and symptoms in addition to the back complaints. She has a significant emotional component to her pain control at this point as would be normal, but again out of proportion, generalized shaking and tremor, cannot be easily explained.

Dr. Guarnaschelli reported on November 19, 1997, that a total columnar myelogram of Nichols's spine was normal, but a post-myelogram CAT scan showed an expansion of the cervical cord at C4-5. Dr. Guarnaschelli also stated that Nichols's symptoms were "quite difficult to sort out," and that she complained of low back and neck pain along with headaches and shaking.

Nichols was seen again on November 24, 1997. Dr. Guarnaschelli indicated that an MRI showed "an area of cyst formation that appears to be a syrinx." He further noted:

> Her shaking is out of proportion to what one could normally see. According to her and her husband who accompanied her today, we have reviewed the nature of her initial injury and she does state that in addition to striking her back, she also struck her head at the same time. She denies other trauma, injury, or fall to the head or neck that could be potentially an etiology for this. Apparently, from a medical viewpoint, I am having extreme difficulty in explaining her constellation of signs and symptoms. She states that the shaking really began after she returned to work for 2 ½ days and after she was pulling and stretching opening the door at work. The complaints of neck pain and headaches are really difficult to place on the basis of either her cervical or lumbar disc disease.
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> . . . .
>
> Now that the new lesion has developed in the mid-cervical area.[sic] It is impossible to say whether or not this has been a pre-existing problem or in some fashion related to trauma.

Nichols's last visit to Dr. Guarnaschelli was on January 8, 1998. Dr. Guarnaschelli did not believe that Nichols was able to return to any form of work at this time, partly due to her recovery from the lumbar surgery and partly due to "the multiple constellation of signs and symptoms for which she is currently being treated."

According to the Form 107 completed by Dr. Guarnaschelli on February 21, 1998, Nichols "was having primarily complints [sic] of lower back, bilateral hip and bilateral leg pain." Dr. Guarnaschelli indicated that he performed a bilateral decompression of L4-5 and L5-S1 levels with a bilateral L5-S1 discectomy on December 10, 1996. Dr. Guarnaschelli's diagnosis was "bilateral lumbar radiculopathy secondary to a central disc

herniation with superimposed spinal stenosis at L5-S1 and L4-5," which he believed was caused by the work related accident. Dr. Guarnaschelli gave an impairment rating of 12-14%, 50% of which he attributed to pre-existing degenerative disc disease. In regard to the impairment rating, Dr. Guarnaschelli stated that it applied to Nichols's lumbar spine only, and that "temors [sic] a separate issue and not related."

Nichols also introduced medical records and a Form 107 from Dr. Walter Olson (Dr. Olson). In a letter dated March 20, 1998, Dr. Olson stated that Nichols told him she struck her back and head when she fell. Nichols complained of headaches, pain, swelling of her neck and back, dizziness, tremors, trouble swallowing, double vision, shortness of breath, wheezing, coughing, memory problems, sleep disturbance, difficulty concentrating, difficulty with appetite, problems with bowel and bladder function, and muscle weakness. She related most of these symptoms to the tremors. Dr. Olson assessed her condition as follows:

> The patient has a myoclonic disorder. The rapid, tremor-like activity of the hands, trunk and feet and legs while appearing in general like a tremor, particularly with respect to its frequency, nonetheless the irregularity of the movement, both in amplitude and in frequency, belie many polymyoclonus. This is in fact then a myoclonic disorder, not a tremorous one. By the patient's history the movement disorder is time locked to the injury sustained and the lesion discovered is a cervical post-traumatic syrinx unlikely to be a true syrinx of congenital origin because of its irregular borders. This, of course, supports post-traumatic syrinx. The cause of myoclonus can be found anywhere from the cerebral cortex in the peripheral most segment of the nerve

> involved. Since she has involvement from shoulders down the lesion may be of cervical spinal cord or above and a post-traumatic syrinx adequately and aptly serves as cause for her tremulousness. Since she continues to have pain and some disability, decompression of the syrinx may be of some benefit.

In his Form 107 dated January 14, 1999, Dr. Olson noted that surgery to decompress the spinal cord produced "beneficial results." In regard to causation, he indicated that the cervical problems were related to her work-related accident, stating:

> Patient related the onset of the movement disorder to the work injury, she had a post-traumatic syrinx at the level to explain the movements and consistent with her story of the injury.

Dr. Olson gave an impairment rating of 45-74%. In regard to restrictions, he indicated that Nichols "should not work near or with dangerous or "open" machinery due to her myoclonus and dystonia, and that she should not lift more than 20 pounds."

Finally, Nichols submitted medical records from Dr. Dante Morassutti (Dr. Morassutti). According to office notes, Dr. Morassutti first saw Nichols on May 11, 1998, on referral from Dr. Olson. Dr. Morassutti indicated that Nichols's "current symptoms began on October 15, 1997, when she began having diffuse jerking of the upper and lower extremities as well as jerking of her head." Dr. Morassutti indicated:

> My impression is that this patient's symptoms are most likely coming from her spinal cord syrinx. Although it is impossible to say whether the syrinx was pre-existing prior to her injury, the fact that she hit her back and had what suggests that the syrinx was likely post-traumatic, especially given the time period between the time of the accident and the onset of her symptoms.

On May 30, 1998, Dr. Morassutti performed a bilateral C4-5 laminectomy for intramedualry syrinx drainage and insertion of a syringical subarachoid shunt. On November 13, 1998, Dr. Morassutti noted that Nichols had "improved significantly" since surgery.

Nichols saw Dr. Morassutti again on December 21, 1998. Apparently this visit was related more to problems with her lower back as opposed to the syrinx.[3] Dr. Morassutti indicated as follows:

> I reviewed her office notes from Dr. Guarnaschelli. On December 20, 1996 she had bilateral decompression of the L4 and L5, S1 levels with a bilateral L5,S1 discectomy. This was done for bilateral lumbar radiculopathy secondary to central disc herniation with superimposed spinal stenosis at each of those levels. At the time it was felt that she had an aggravation of a dormant non-disabling condition by her injury on September 23rd, 1996 and Dr. Guarnaschelli gave her a 12 to 14 percent permanent whole body impairment, according to the AMA Guidelines. His notes indicate that her tremors were a separate issue and not related. I do not fully agree with this. He also indicated a permanent restriction of no lifting over twenty pounds.
>
> Her first MRI of the cervical spine indicating a syrinx was performed on December 21, 1997 over one year from the time of her injury. The fact that she does not have a Chiari malformation or other skull base abnormality or spinal abnormality to cause a secondary syrinx, I feel that her syrinx most likely arose from her work related injury on September 23, 1996. This is based on the patient's history that she hit her back and her head at the time of the injury. There is a possibility that the syrinx may have been a

[3]Dr. Morassutti's records show that Dr. Guarnaschelli transferred treatment of Nichols's lower back complaints to him.

> dormant condition, however, I feel that this is probably unlikely.

In a letter to Nichols' attorney dated February 15, 1999, Dr. Morassutti stated:

> This letter is in regard to your inquiry as to whether Mrs. Nichols' cervical syringomyelia is correlated to the injuries that she sustained while working at the Fischer Packing Plant in September of 1996. Given the lack of a congenital lesion such as a Chiari malformation, spinal cord or spinal canal lesion which would lead to a cervical syrinx, I would have to believe that her cervical syrinx was the result of the trauma sustained at the time of her above mentioned accident. In particular, the patient gives a history of also hitting her head which would have likely caused a flexion or extension movement of her cervical spine. The other possibility is that the syrinx may have been pre-existing and through the course of injury and subsequent lumbar surgery there may have been a change with her cerebral spinal fluid dynamics which may have caused the syrinx to become symptomatic. Given her marked improvement with respect to her minipolymyoclonus following decompression of her syrinx, I feel confident that the syrinx was responsible for tremor like symptoms.
>
> Although a direct link to her injury with respect to the cervical syrinx cannot be directly proven, my belief is that the syrinx was a result of her initial injury.

Fischer filed a medical report from Dr. Thomas Marshall (Dr. Marshall) into evidence. Dr. Marshall saw Nichols for an independent medical examination on April 13, 1999. Dr. Marshall noted:

> During this examination, this woman kept her eyes partially closed, moved in a slow shuffling manner, exhibited a gross tremor of the left hand and leg for a short period of time during the early part of the examination, claimed sensory changes which were inconsistent with anatomy, and carried out functions inconsistently. It was my

impression that she was consciously attempting to mislead the examiner with this dramatization.

. . . .

The following comments are made in response to the questions submitted at the time of this examination:

1. Diagnosis:

    1. Chronic pain syndrome
       Post op cervical and lumbar laminectomies

2. In my opinion the syrinx found was a congenital or idiopathic syrinx producing no symptoms, either before or after the injury of September 23, 1996. The tremors are part of the dramatization characteristic of chronic pain syndrome.

3. I do not believe that records show that she suffered any work related injury to the cervical spine. Functional impairment, under the AMA Guidelines, would be estimated to be 13 percent impairment of the whole person as a result of the two level cervical laminectomy and second operative procedure.

4. It is my opinion that she does not have any permanent impairment to her cervical spine as a result of the work related injury, nor is there evidence that a preexisting dormant condition was aroused.

5. No further treatment of her cervical spine injury is needed.

6. No restrictions are needed as a result of her complaints of cervical spine injury.

In an opinion dated August 12, 1999, the ALJ found as follows in regard to Nichols's cervical condition:

The evidence establishes that plaintiff did not give immediate notice of any alleged injury to her cervical area immediately following the incident, despite the fact that she states that she hit her head and began experiencing symptoms not long after the incident. Further, the records indicate that

> plaintiff did not actually report a cervical injury to her physicians until almost a year after the injury. Neither Dr. Guarnaschelli nor Dr. Marshall believed that plaintiff's cervical condition was causally related to the original injury.
>
> In light of the fact that plaintiff apparently failed to give notice to her employer despite her claims that she was experiencing symptoms in her neck, plus the fact that any mention of her neck condition did not appear in the medical records until almost a year after the incident, I believe that she has failed to establish that she gave due and timely notice of the cervical injury. Also, she has failed to establish that her cervical condition is related to the incident of September 1996. Therefore, the Defendant-Employer shall not be responsible for any medial [sic] expense related to plaintiff's cervical condition, nor will any impairment for said condition be considered in the determination of plaintiff's occupational disability.

The Board affirmed the opinion of the ALJ in an opinion dated February 4, 2000, in which it stated:

> The ALJ dismissed this matter on two grounds. One being notice, the second being lack of causation. We believe that the significant finding of the ALJ relates to causation. While he makes reference to due and timely notice and believing that there was evidence to support his determination as it related to notice, his primary reference to the lack of communication on the part of Nichols to her employer concerning any cervical spine condition ultimately goes to his determination that she failed to sustain her burden of proof to establish a work-related cervical spine injury. It is true, as pointed out by Nichols, that the fact finder must look at the totality of the circumstances in reaching his conclusion. See Jones vs. Newburg, Ky., 890 SW2d 284 (1994). It is clear by the ALJ's opinion that he analyzed the aggregate facts and came to a point where there was a total divergence of opinion as to whether there was a work-connectedness to the development of cervical spine problems in 1997. Dr. Morasutti [sic]

and Dr. Olson believed there was. Dr. Guarnaschelli and Dr. Marshall believed there was not. There can be no clearer direct conflict in the evidence than one such as this which was presented to the ALJ. Ultimately, Nichols believes and asserts that the ALJ should have relied upon the testimony of Drs. Morasutti [sic] and Olson. While the entirety of their conclusion is not based upon the history they received, it is clear that to a significant degree each of these physicians reached the conclusion as to work-relatedness was [sic] based upon what they were told by Nichols. If there is other evidence of record which calls into question the history, then the ALJ need not give unquestioned credibility to that testimony. Osborne vs. Pepsi Cola, Ky., 816 SW2d 643 (1991).

Both the documentation and the testimony from Garry Bork could lead to the conclusion as found by the ALJ that the history of Nichols having struck her head was not totally accurate. Her description of the initial incident certainly would lead to a strong implication that in falling after tripping over the pallets that she landed with her low back against a stack of pallets rather than falling to the concrete floor. None of the records contemporaneous with the fall clearly establish that she fell completely to the floor striking her head. The ALJ further noted that it was not until 1997, over one year after the incident, that her treating surgeon, Dr. Guarnaschelli, had any notations concerning either headaches or cervical spine problems. While Nichols testified that she relayed certain information to Dr. Guarnaschelli, the ALJ is within his authority in concluding that the testimony he deemed more credible indicated that the first complaints related to the cervical spine were over one year after the accident.

There was substantial evidence and very direct evidence presented to the ALJ that there was no work relationship between the cervical spine problem and the work injury. While there was evidence that would have supported a finding of causation, that is insufficient to alter the fact finder's decision on appeal. McCloud vs. Beth-Elkhorn Corp., Ky., 514 SW2d 46 (1974). Although Dr.

> Marshall assessed an impairment rating to the cervical spine, such an assessment does not lead to the inference that the impairment is related to a work injury. Dr. Marshall was unequivocal, in our opinion, in his conclusion that there was no work relationship. For these reasons alone, the ALJ's decision to dismiss the claim for benefits associated with the cervical spine condition is affirmed.

This appeal followed.

Nichols contends that the ALJ erred in finding that she failed to give notice of the injury to her cervical spine. We disagree.

Pursuant to KRS 342.195(1), notice of a work-related accident is to be given to the employer "as soon as practicable after the happening thereof." KRS 342.190 requires that the notice be in writing, and that it state "the time, place of occurrence, nature and cause of the accident . . . [and] the nature and extent of the injury sustained[.]" These two statutes have been construed together "to mean that notice of injury must be given, and this mean notice of 'the specific injury for which the employee is claiming compensation.'" Reliance Diecasting Company v. Freeman, Ky., 471 S.W.2d 311, 312 (1971), citing Proctor and Gamble Manufacturing Co. v. Little, Ky., 357 S.W.2d 866 (1962). Nichols bears the burden of proving that she gave timely notice of the accident. Buckles v. Kroger Grocery & Baking Co., Ky., 134 S.W.2d 221, 224 (1939).

In this case, Nichols fell in September 1996. All of the notice and accident reports completed by Nichols claimed that she sustained an injury to her lower back. Although Nichols stated that she told Bork she fell and hit her back and head,

Bork testified that he was told she hit her back only. Despite Nichols's testimony that she told Dr. Guarnaschelli about neck pain as early as December 1996, his office notes make no mention of complaints of neck problems until November 1997, some fourteen months after the accident. In fact, Nichols made no claim that her neck problems were related to her fall until November 24, 1997, when she told Dr. Guarnaschelli that she struck both her head and lower back when she fell. We would further point out that at the time Dr. Guarnaschelli first noted Nichols's complaints of neck problems, he had been treating her well over a year. Under this set of facts, we cannot find that Nichols gave notice of her neck injury "as soon as practicable after the happening thereof."

In so holding, we are mindful of the fact that Nichols did notify Fischer in regard to her lower back injury and that "notice of a physical injury carries with it notice of all things which reasonably may be anticipated to result from it." Blue Beard Mining Co. v. Litteral, Ky., 236 S.W.2d 936, 938 (1951). However, we do not believe that notice that Nichols fell and hit her lower back was reasonably sufficient to notify Fischer that she injured her neck as well.

Even if we were to find that Nichols gave timely notice of her neck injury, she bears the burden of proof and risk of persuasion before the ALJ as finder of fact in regard to the causation of her neck problems. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735, 736 (1984). As Nichols was the unsuccessful claimant below, she must show that the evidence

before the ALJ was "so overwhelming as to compel a finding in [her] favor" in order to prevail on appeal. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985). In order to be compelling, the evidence must be such that "no reasonable person could reach the same conclusion as the ALJ." Daniel v. Armco Steel Company, L.P., Ky. App., 913 S.W.2d 797, 800 (1995). Nichols cannot meet this burden merely by showing that the record contains some evidence which would warrant reversal in her favor. Special Fund v. Francis, Ky., 708 S.W.2d 641, 644 (1986). Where conflicting evidence is offered, the decision as to which evidence to believe is left to the discretion of the ALJ. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977). The fact that we may have decided an issue differently based on the evidence presented does not compel reversal, and we are not to substitute our judgment for that of the ALJ as to the weight of the evidence presented. Francis, 708 S.W.2d at 644.

Having reviewed the record on appeal, we believe that the evidence presented does not compel a different result. Neither Dr. Guarnaschelli nor Dr. Marshall believed that Nichols's fall caused the injury to her cervical spine, and the ALJ relied on their opinions in reaching his decision. The fact that Dr. Morassutti and Dr. Olson may have believed otherwise does not require reversal.

Having considered the parties' arguments on appeal, the opinion of the Worker's Compensation Board is affirmed.

EMBERTON, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS BY SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: I disagree with the majority opinion and would reverse the Board and the ALJ. The Board itself noted that the notice issue was not critical; the majority opinion resurrects that issue and places undue emphasis on it. More importantly, in my assessment, the evidence of this woman's injury is so overwhelming as to compel a contrary finding. Consequently, I would reverse and remand.

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