

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-001247-WC

ROBERT WAYNE AVERY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-94-53105

DELTA AIRLINES, INC.; HON. DONNA H.  
TERRY, ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING  
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BEFORE: GUDGEL, JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: Robert Wayne Avery has petitioned this Court for review of an opinion by the Workers' Compensation Board which affirmed the Administrative Law Judge's opinion and award. The ALJ awarded Avery a 20% permanent partial disability as a result of his bilateral carpal tunnel syndrome. However, she dismissed the claims related to Avery's cervical spine problems on the grounds they were not work-related and that he had failed to give due and timely notice of these injuries; and she also dismissed his claims related to left cubital tunnel syndrome and bilateral thoracic outlet compression syndrome on the grounds that to the

extent these conditions were alleged to have been disabling beyond the bilateral carpal tunnel syndrome they did not result in any additional occupational disability and that he had failed to give due and timely notice of these injuries. Having concluded that the Board has not overlooked or misconstrued controlling statutes or precedent or committed an error in assessing the evidence so flagrant as to cause gross injustice, we affirm.

The Board's opinion summarized the facts as follows:

This is an interesting matter in that it has a multitude of medical evidence and is somewhat complicated procedurally. The original claim was filed pro se on December 20, 1994 with an allegation of bilateral carpal tunnel syndrome. There was a request to place the claim in abeyance on February 1, 1995. The matter remained in abeyance until November 20, 1998. As the claim began, it was assigned to an ALJ/Acting Arbitrator. There was a motion to amend made on February 18, 1999 alleging cervical problems as well as cubital tunnel syndrome. The matter was transferred to an ALJ on March 10, 1999 and an order amending the claim was entered on March 18, 1999 to include thoracic outlet compression, cubital tunnel syndrome and cervical problems. A second motion to amend was made on September 29, 1999 alleging cumulative trauma with a further request for amendment seeking an allegation of a disability manifestation date, that order being entered on March 9, 2000. The Opinion of the ALJ was rendered December 7, 2000.

Avery began working for Delta in 1968 and worked there for approximately thirty-one years. He took early retirement on September 30, 1999 because he did not believe he could continue the activities necessary for his job. He worked as a customer service agent, which required him to check passengers and handle and load luggage. Most of his work for Delta had been at the Louisville Airport but, according to him because he had to work by himself frequently there, he sought a transfer to the Cincinnati Airport. He was

able to effect that transfer in 1995. Apparently, he commuted to that job.

In either 1991 or 1992 Avery began to experience problems in his hands and wrists. Apparently, there was an incident while he was loading some luggage in 1991 in which he felt pain in his shoulder and left bicep. He came under the care of Dr. Vasudeva Iyer, who performed EMG and NCV studies and diagnosed carpal tunnel syndrome. This was sometime in 1994. He was referred to Dr. Breidenbach in November of 1994. Dr. Briedenbach initially began treating Avery conservatively with steroid injections, splits and vitamins. He testified with these conditions that Dr. Breidenbach recommended he limit some of his activities. He eventually underwent surgery for a right carpal tunnel release in March of 1995 and then a left carpal tunnel release in December of 1995. While off, he was paid wage continuation and other benefits from Delta. After his surgeries, he underwent physical therapy and eventually returned to work with recommendations of no lifting over 70 pounds. However, even with his attempt to limit his activities he began to experience symptomatology, particularly in the left hand, and had a second left carpal tunnel release in January of 1997. As he continued to work, Avery began to develop additional problems further up into his arms and even into his neck. Eventually, he reached the point where he could no longer engage in a full range of activities.

Avery testified he was not actually diagnosed with cervical problems until sometime in 1999. He acknowledged there were occasions when he would have stiffness in his neck and shoulders but he did not necessarily attribute these to problems in his neck. From 1991 or 1992 he would have periodic problems in both of his upper extremities in different forms. In addition to being diagnosed with cervical difficulties and bilateral carpal tunnel syndrome, he's also been diagnosed with bilateral thoracic outlet compression and bilateral cubital tunnel syndrome. He has seen a multitude of physicians.

Avery testified his employer was aware he was having some difficulties and that on occasion he was on restricted activities. He

could not recall whether he ever specifically advised Delta that he believed his problems were related to work with the exception of the carpal tunnel syndrome. Avery denied having any specific incidents involving either his neck or upper extremities other than specifically the one occasion in 1991 reflected in the doctor's notes.

Avery does not believe he has the capability of returning to active gainful employment, certainly cannot return to the type of work he was doing for Delta and he has now applied for Social Security disability, although at the time of the hearing he had received no determination.

All of the medical testimony was presented by way of Form 107s or reports. This includes medical information from Dr. Petruska, Dr. Goldman, Dr. Gabriel, Dr. Collis, Dr. Dues, Dr. Iyer, Dr. Garcia, Dr. Stewart, and Dr. Breidenbach and from University Neurologists.

Rather than trying to individually summarize the testimony from these physicians, we will attempt to piece it all together.

The first reported problems began in 1991 with a history of placing luggage on an airplane or taking it off and feeling pain in the shoulder and bicep area. Shortly thereafter, Avery began to develop additional pain and when he came to see a physician, EMGs and NCVs studies were performed which revealed bilateral carpal tunnel syndrome. Although he had complaints of hand and wrist difficulties, it appears Avery's primary complaints were in the shoulder region. Avery was treated primarily with conservative care and recommended to limit his activities involving his upper extremities. He underwent steroid injections as well as wrist splinting. In some of the early medical reports there were questions raised by one of the physicians as to whether this might be cervical radiculopathy, although the physician raising that question did not believe the symptomatic complaints were consistent with a true radiculopathy.

Thereafter, the treatment was focused upon Avery's hands and wrists through the

care of Dr. Breidenbach. Having been diagnosed with bilateral carpal tunnel and noting that upon each release to return to work there seemed to be a reoccurrence of the severity of the symptomatology, eventually Avery underwent surgery on both wrists. Salary continuation was paid and medical expenses for this treatment were covered by Delta. Dr. Breidenbach, in some of his notes, indicates that while it is evident Avery has carpal tunnel syndrome, that condition would not explain either his bicep or shoulder problems. At that time, it was thought Avery might have referred pain into his arm from a shoulder strain.

As the years continued, particularly while this claim remained in abeyance, Avery continued to see a variety of physicians. During that time for the first time in early 1997 there is reference to likely cervical involvement. There are indications in the medical reports that on at least one occasion Avery reported having a stiff neck and problems into the upper extremities. At that time, the doctor suggested to him that he might have radiculopathy (although Avery contends this did not indicate to him that he had problems in the neck). Although he continued to be seen by physicians throughout 1997 and 1998, most of the treatment continued to be focused upon carpal tunnel, although diagnoses for cubital tunnel and possible thoracic outlet compression were also noted. Again, during this time, there is some reference to the possibility of cervical radiculopathy and spondylosis.

As the medical treatment continued, Avery came to see Dr. Petruska and Dr. Tinsley Stewart. Apparently, each of these physicians eventually had the opportunity to review specialized testing, noted he had cervical spondylosis, degenerative changes in the cervical spine and that he had a radiculopathy. Throughout their treatment, there is no reference to any specific incident occurring at work and actually minimal discussion of what his work activities [were]. With his cervical spine as well as the cubital tunnel syndrome, Avery has been treated conservatively.

Eventually, the diagnosis of cervical difficulties was confirmed and Avery has been

assessed with impairment ratings from anywhere from 2 to 18%. Recommended lifting restrictions were imposed as early as 1998 which were more restrictive than the original 70 pound limitation.

The ALJ, in an opinion and award dated December 11, 2000, made a finding that, with the exception of the bilateral carpal tunnel syndrome, Avery's conditions were not work-related and that he had failed to give due and timely notice of his injuries. On May 9, 2001, the Board entered an opinion affirming the ALJ's decision. This petition for review followed.

The claimant in a workers' compensation case bears the burden of proving each and every essential element of his claim.<sup>1</sup> For an unsuccessful party who had the burden of proof before the ALJ to succeed on appeal, he must establish that the evidence compelled a finding in his favor.<sup>2</sup> To be compelling evidence, the evidence must be so overwhelming that no reasonable person could reach the same conclusion as the ALJ.<sup>3</sup> It is not enough for the claimant to show that there was substantial evidence which could have supported a contrary conclusion.<sup>4</sup> This Court's function in reviewing the Board's decision is "to correct the Board only where the [ ] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed

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<sup>1</sup>Snawder v. Stice, Ky.App., 576 S.W.2d 276 (1979).

<sup>2</sup>Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735 (1984).

<sup>3</sup>REO Mechanical v. Barnes, Ky.App., 691 S.W.2d 224 (1985).

<sup>4</sup>McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974).

an error in assessing the evidence so flagrant as to cause gross injustice.”<sup>5</sup>

Avery first argues that the ALJ improperly relied upon the opinion of Dr. Goldman to support her conclusion that Avery’s cervical spine conditions were not work-related, because his opinion was based upon “insufficient, and [ ] therefore, inaccurate [ ] history[.]” We believe the Board thoroughly addressed this issue by stating:

Dr. Goldman, whom Avery thinks is a fraud, believed the entirety of the cervical spine problems related to the natural aging process, i.e. the development of degenerative disk disease and osteoarthritis. While Avery makes a strong attack upon Dr. Goldman’s analysis of the history, we cannot accept Avery’s conclusions. In reviewing Dr. Goldman’s report, he indicated he reviewed medical records going back to 1991. While his report does not contain a detailed explanation of the activities reported by Avery, these medical reports do. Contrary to the arguments of Avery, we do not believe the only reasonable interpretation of Dr. Goldman’s conclusion to be that since there was no specific incident identified, there could not be a work injury. Rather, an equally reasonable interpretation of Dr. Goldman’s evidence is that considering the totality of the medical treatment from 1992 to 2000, considering the onset of the symptomatology and how it developed and having an understanding of the work activities engaged in by Avery would lead one to conclude his work activities and particularly that he had been restricted for some period of time, did not constitute a cumulative trauma. Although Avery makes much of the point that Dr. Goldman is a “hired gun”, Kentucky workers’ compensation law has long provided that the fact finder may rely upon either a treating physician or an examining physician and may rely upon

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<sup>5</sup>Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

differing specialties as the fact finder sees fit [citation omitted].

While a different ALJ may have made a different finding as to whether Avery's cervical spine complaints were the result of work activities or due to degenerative disc and joint disease which are part of the natural aging process, as long as the findings of this ALJ are supported by substantial evidence, the Board and this Court cannot set those findings aside.<sup>6</sup> We are in agreement with the Board that Dr. Goldman was adequately informed of Avery's work activities and medical treatments.

Avery makes two primary arguments regarding this issue. First, he claims that the medical reports referred to by Dr. Goldman in his report "DO NOT describe a history of Mr. Avery's work for Delta over the 31 years of Mr. Avery's employment there." Second, he claims that Dr. Goldman "clearly did not consider the issues applicable to whether or not Mr. Avery had sustained a cumulative trauma to his cervical spine[.]" We have reviewed Dr. Goldman's report and we agree with the Board's conclusions. While there is no doubt that more specific information concerning Avery's work history would have been helpful to understanding Dr. Goldman's report, the report does note that Avery retired from Delta Airlines in 1999 after working as a baggage handler. In assessing the cause of Avery's cervical spine problems, we believe a more significant aspect of Dr. Goldman's report is his reference to Dr. Petruska's treatment of Avery. Dr. Goldman's report states that Avery was seen by Dr. Petruska on September 28, 1999, for "the first in a series of

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<sup>6</sup>Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).



visits involving an MRI which showed degenerative changes at C4-5, C5-6, and C6-7, and a myelogram and post-myelographic CT scan which showed cervical spondylosis at those levels[.]” Certainly, these medical findings constitute substantial evidence in support of the ALJ’s finding that Avery’s cervical spine problems were caused by the natural degenerating of the vertebrae and not by cumulative trauma. Thus, we hold that Dr. Goldman’s findings and the medical findings relied upon by him are competent evidence and the ALJ was not “clearly erroneous” in relying on these findings.<sup>7</sup>

Furthermore, the ALJ has the right to believe part of the evidence and disbelieve other parts, even if it comes from the same witness.<sup>8</sup> We find it noteworthy that Avery’s own physicians were not in agreement as to what caused his alleged condition. The Board stated:

One believed there was an arousal of a pre-existing condition by the “work-injury”; the other believes there was not. One believes there was an acceleration of the aging process by the work injury; the other does not. Very simply, the medical testimony on causation is varied and would support any number of conclusions.

We hold that there was substantial evidence to support the ALJ’s finding that Avery’s cervical spine condition was not work-related, and that the evidence did not compel a finding in his favor.

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<sup>7</sup>Hudson v. Owens, Ky., 439 S.W.2d 565, 568 (1969).

<sup>8</sup>Id.

In challenging the ALJ's determination that he failed, in accordance with KRS<sup>9</sup> 342.185(1),<sup>10</sup> to give due and timely notice to Delta of his cervical spine condition, Avery argues: (1) that Delta should be estopped from claiming it did not have notice because it paid medical benefits under its workers' compensation program for his cervical spine condition; and (2) that any inference drawn by the ALJ that Avery knew in either 1997 or 1998 that "he might have a work-related condition involving his neck and upper extremities beyond simply the carpal tunnel syndrome" was not supported by the evidence.

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<sup>9</sup>Kentucky Revised Statutes.

<sup>10</sup>This provision provides:

Except as provided in subsection (2) of this section, no proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof and unless an application for adjustment of claim for compensation with respect to the injury shall have been made with the department within two (2) years after the date of the accident, or in case of death, within two (2) years after the death, whether or not a claim has been made by the employee himself for compensation. The notice and the claim may be given or made by any person claiming to be entitled to compensation or by someone in his behalf. If payments of income benefits have been made, the filing of an application for adjustment of claim with the department within the period shall not be required, but shall become requisite within two (2) years following the suspension of payments or within two (2) years of the date of the accident, whichever is later.

The issue of due and timely notice presents a mixed question of law and fact.<sup>11</sup> In Special Fund v. Clark,<sup>12</sup> the Supreme Court of Kentucky stated:

Once a worker is aware of the existence of a disabling condition and the fact that it is caused by work, the worker would also be aware that continuing to perform the same or similar duties was likely to cause additional injury. For that reason, the rationale which supports the decision in Randall Co. v. Pendland does not support tolling the period of limitations for whatever additional injury is caused by trauma incurred after the worker discovers the existence of a work-related gradual injury. It follows, therefore, that where a claim is not filed until more than two years after the worker's discovery of an injury and the fact that it was caused by work, KRS 342.185 would operate to prohibit compensation for whatever occupational disability is attributable to trauma incurred more than two years preceding the filing of the claim.

We are not aware of any workers' compensation case law that supports Avery's estoppel argument. However, as noted by the Board, the Court in General Electric Co. v. Morris,<sup>13</sup> observed that employers are encouraged to pay temporary total disability benefits and medical benefits on a voluntary basis; and if such a payment were deemed to constitute an estoppel to raising issues in the employer's defense, the employer would hesitate in making voluntary payments. Avery also argues that Delta was not prejudiced in any way by his failing to provide timely notice, but lack of prejudice is not a factor to consider

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<sup>11</sup>Harry M. Stevens Co. v. Workers' Compensation Board, Ky.App., 553 S.W.2d 852 (1977).

<sup>12</sup>Ky., 998 S.W.2d 487, 490 (1999).

<sup>13</sup>Ky., 670 S.W.2d 854 (1984).

in determining compliance with the requirements of KRS 342.185(1).<sup>14</sup>

Avery also claims that the evidence did not support the inference made by the ALJ concerning when he became aware of his cervical spine condition. Avery did not amend his application to include allegations of cervical radiculopathy until March 18, 1999. The ALJ found that these conditions were diagnosed by Dr. Breidenbach between May 1, 1997, and October 17, 1997. The Board addressed the ALJ findings as follows:

The instant action presents at best a muddy picture of what Avery did or did not understand. He certainly understood he was engaged in repetitive activities. While he understood that as early as 1997 a physician was suggesting he had "radiculopathy", he testified he did not understand this to be related to his cervical spine. He did acknowledge he made reference to a stiff neck and periodically experiencing a stiff neck since the early 1990s. The ALJ, we believe, drew a reasonable inference from the record that by 1997, or 1998 at the latest, Avery understood he might have a work-related condition involving his neck and his upper extremities beyond simply the carpal tunnel syndrome.

Avery, in his testimony, was less than clear as to the verbal information he provided his employer and it is argued the first actual notice that he was claiming either cervical spine problems, thoracic outlet problems or cubital tunnel problems was February of 1999 when there was a motion to amend his 101. The ALJ, believing he had sufficient information to reach such a conclusion long before that, deemed this to be lacking in due and timely notice. This called for a reasonable inference on the part of the ALJ. Reasonable inferences, so long as they are borne out by the record, are solely for the ALJ and not this Board.

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<sup>14</sup>Special Fund, supra at 644.

Jackson vs. General Refractories Co., Ky.,  
581 SW2d 10 (1979).

We hold that there was substantial evidence in the record to support the ALJ's finding that Avery failed to give Delta due and timely notice of his cervical spine condition.

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

ALL CONCUR.

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