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Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000749-WC

BROWN-FORMAN CORPORATION — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-99-82662

MARION LOUISE UPCHURCH; DONNA H. TERRY, Administrative Law Judge; and WORKERS' COMPENSATION BOARD — APPELLEES

and NO. 2002-CA-001090-WC

MARION LOUISE UPCHURCH — CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-99-82662

BROWN-FORMAN CORPORATION; DONNA H. TERRY, Administrative Law Judge; and WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

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

BEFORE: COMBS and DYCHE, Judges; and JOHN WOODS POTTER, Special Judge.[1]

COMBS, JUDGE: Brown-Forman Corporation appeals from an opinion of the Workers' Compensation Board affirming the decision of the Administrative Law Judge (ALJ). The ALJ awarded Marion Louise Upchurch, the appellee, total occupational disability benefits for a work-related impairment affecting both of her wrists. Brown-Forman contends that Upchurch's claim was barred by the statute of limitations and that the ALJ erred in admitting certain expert testimony concerning the cause of Upchurch's wrist condition. In her protective cross-appeal, Upchurch addresses the Board's failure to rule on her allegation that the ALJ erred in striking certain medical articles from the record. After a review of the record, we conclude that the Board neither overlooked nor misconstrued controlling statutes or legal precedents — nor did it err in assessing the evidence. Thus, we affirm. See, Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992).

Upchurch began her thirty-two years of employment with Brown-Forman in 1967 as a production worker. She was frequently required to perform lifting and gripping tasks and other physical activities necessitating the repetitive movement of her hands and wrists. Upon experiencing considerable pain in her neck, hands, and arms in the fall of 1998, Upchurch consulted the company's nurse, who referred her to Dr. Urda, the company's doctor. Dr.

[1]Senior Status Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Urda told Upchurch that her physical problems were not work-related.

After learning that her wrist pain was not attributable to her work, Upchurch immediately consulted with her family physician, who referred her to an orthopedist, Dr. Todd Hockenberry in November 1998. Dr. Hockenberry examined her and reported that Upchurch had a "complicated left wrist problem" and that she needed to be evaluated by a hand specialist. In May 1999, Upchurch was examined by Dr. Amit Gupta, a specialist with Kleinert, Kutz and Associates, who diagnosed her condition as bilateral scapholunate separation and radioscaphoid arthritis of the left wrist. Contrary to Dr. Urda's diagnosis, Dr. Gupta informed Upchurch that these conditions were indeed related to her work at Brown-Forman. Dr. Gupta initially treated Upchurch conservatively, and she continued to work with restrictions until she retired in late 1999. She underwent surgery in January 2000 to fuse her left wrist. At the time of the hearing on the workers' compensation claim, Dr. Gupta had recommended that Upchurch also undergo surgery on her right wrist.

Upchurch filed a claim for workers' compensation benefits in December 2000. Her claim was initially predicated on three events at work, all of which occurred during 1999 and involved injury to her wrists. After the medical proof established that these events did not cause her disabling condition, Upchurch amended her claim to assert that her arthritic condition was the result of cumulative trauma to her wrists. Brown-Forman filed a special answer, raising a statute

of limitations defense. It argued that Upchurch's claim began to run — at the very latest — in October 1998 when she first consulted the company's nurse for the pain she was experiencing in her wrists and hands.

Brown-Forman also contested the admissibility of the expert testimony of Dr. Gupta and Dr. Richard Sheridan, an orthopedic surgeon, both of whom linked Upchurch's bilateral wrist condition to her work activities. Although both doctors recognized that the arthritic condition from which Upchurch suffers is typically caused by a severe trauma to the wrist, they testified that it was the repetitive use of her hands and the loads placed on her wrists at work that caused and hastened the progressive degenerative damage to her ligaments resulting in her disability. Citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 578, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), Brown-Forman attempted to exclude the expert opinion testimony on causation on the basis that it was unreliable. Specifically, it argued that neither doctor had "any special expertise in medical epidemiology [sic][2]," that their theory of causation had not been tested and was "not based upon reliable studies with controls," and that their theory had not been "published and subjected to peer review."

Prior to rendering her opinion and award, the ALJ ruled that the test in Daubert was not applicable in workers' compensation cases and denied Brown-Forman's motion to exclude the expert evidence. In her final decision, the ALJ resolved the

[2]We believe that appellant intended to refer to "etiology."

statute of limitations issue and others in favor of Upchurch as follows:

> Ms. Upchurch testified that while she began to experience problems with her wrists in the fall of 1998, she was advised by the company doctors and by the physicians to whom she was referred that her problems were not work-related until she consulted Dr. Gupta. Despite prior medical treatment, this was the first time that she was aware that her ongoing upper extremity problems were causally related to work activities. It is less than clear from Dr. Gupta's records when this fact was communicated to Ms. Upchurch, but Dr. Gupta informed Brown-Forman's third party administrator on July 6, 1999 of the diagnosis and that it was conceivable that the condition had been aroused by the March 30, 1999 fall at work. By September 9, 1999, Dr. Gupta had informed Ms. Upchurch's counsel that the years of repetitive production work was [sic] the cause of her wrists simply "wearing out" and that the resultant alteration of biomechanics caused her current problem. The latter letter was written as the result of a May 21, 1999 office visit. Based upon the convincing and persuasive testimony of Dr. Gupta, it is found that Ms. Upchurch did sustain work related injuries in 1999, with the last specific manifestation of May 5, 1999 and that she was informed on May 21, 1999 of the probable work-relatedness of her complaints. Dr. Gupta's opinion was subsequently communicated through transmission of medical reports to Brown-Forman. Ms. Upchurch testified that she reported all symptomatology [sic] to Brown-Forman and its medical department and that she further informed Brown-Forman of the diagnoses as soon as they were communicated to her. The July 6, 1999 letter from Dr. Gupta to Brown-Forman's third party administrator indicates that the possibility that Ms. Upchurch's condition was either caused by or aggravated by work and was clearly sufficient to put Brown-Forman on notice even absent Ms. Upchurch's verbal notification. Based upon the testimony of Dr. Gupta and Ms. Upchurch, it is found that her work-related condition became manifest and disabling no later than May 5, 1999, and the causal nexus to her work activities was

> communicated no later than May 21, 1999. Further, it is found that these diagnoses and the possible (and later certain) connection to work activities were communicated to Brown-Forman in a timely fashion. Thus, the issues of work-relatedness/causation, occurrence of a work injury, and notice are resolved in favor of Ms. Upchurch. As the instant claim was filed within two years after the date of injury, it is not barred by KRS[3] 342.185, the two-year statute of limitations. Although Brown-Forman argues for an earlier manifestation date for the injury, that issue is resolved hereinabove.

Opinion of ALJ at pp. 8-9. Based on the testimony of Dr. Gupta, the restrictions recommended by Dr. Sheridan, and the testimony of a vocational psychologist, Robert Tiell, the ALJ found that there was "little, if any, likelihood" that Upchurch would be able to "consistently find any employment" and concluded that she was 100% occupationally disabled.

In its review, the Board agreed with the ALJ's determination that the statute of limitations did not begin to run in October 1998 -- as had been argued by Brown-Forman. In addition to the reasoning employed by the ALJ, the Board relied on Toyota Motor Mfg., Kentucky, Ins. v. Czarnecki, Ky.App., 41 S.W.3d 868 (2001), and determined that the statute of limitations was tolled until May 1999 because Upchurch had been misinformed about the cause of her wrist condition by Dr. Urda, Brown-Forman's doctor. The Board also cited Hill v. Sextet Mining Corp., Ky., 65 S.W.3d 503 (2001), in which the Kentucky Supreme Court recognized that a worker "cannot be expected to have self-diagnosed" the cause of a harmful change to his body as having

[3]Kentucky Revised Statutes.

been "a gradual injury versus a specific traumatic event." By analogy, the Board reasoned that a worker cannot be expected to know that a gradual injury is work-related when faced with a doctor's opinion to the contrary.

With respect to the ALJ's refusal to exclude the testimony of Drs. Gupta and Sheridan, the Board held as follows:

> In Irving Materials, Inc.,[4] supra, we found that since there was no novel scientific theory being put to use, it was not necessary for the proponent of the challenged evidence to establish that the Daubert criteria were met. In doing so, we relied on the Supreme court's holding in Collins v. Commonwealth, [Ky., 951 S.W.2d 569 (1997)]. We also considered that the purpose behind a determination of reliability of scientific testimony under Daubert was to protect a jury from being unduly influenced by "junk science" when its introduction may tend to cloak it in an aura of scientific respectability. Since the Administrative Law Judge in a Kentucky workers' compensation claim acts as both "gatekeeper" and "fact-finder," the ALJ could allow the introduction of testimony with a shaky foundation, but then consider that fact when determining the weight to be assigned that evidence.
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> We believe the ALJ correctly ruled on the admissibility of the contested evidence. This was simply a case where the claimant presented the testimony of her treating physician to support a finding on causation. As stated in Daubert, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are traditional and appropriate means of attacking shaky but admissible evidence." As noted by the ALJ in her opinion, Brown-Forman put forth a vigorous cross-examination of Dr. Gupta.

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[4] Irving Materials, Inc. v. Duncan, DWC No. 00-88401, rendered September 26, 2001. This case did not proceed past the level of the Board.

> Nonetheless, the ALJ, in her role as gatekeeper, and for that matter, trier of fact, allowed the introduction of the evidence. As stated by the Supreme Court, the inquiry envisioned by Rule 702 is a flexible one. Consequently, we do not agree with Brown-Forman's argument that the lack of a medical article subject to peer review should prohibit the evidence from being admissible. It is not disputed that Drs. Gupta and Sheridan have the requisite knowledge and experience to qualify as medical experts. Unquestionably, their testimony regarding causation was relevant to the issues to be determined by the ALJ. Furthermore, as we determined in Irving Materials, Inc., supra, since no novel scientific principle or theory is involved, it is unnecessary for their testimony to meet the Daubert criteria. We therefore believe the physicians' testimony regarding causation was properly admitted.

In this appeal, Brown-Forman continues to argue that Upchurch's claim should have been dismissed as untimely and attempts to distinguish the instant case from the facts presented in Czarnecki. However, we agree with the Board that Czarnecki is the correct precedent to be applied. In Czarnecki, a case also involving a cumulative trauma, this court stated that an employer is "bound by the statements of the physicians it employs to tend its workers" and concluded that an employer is estopped from benefitting from the two-year statute of limitations where its employee is misinformed about the nature of his condition by the company's doctor. Id., 41 S.W.3d at 871-872.

While Brown-Forman correctly notes that Upchurch's condition was painful and that its disabling nature was manifest by October 1998, that fact alone does not control the issue of the running of the limitations period. In Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96 (1999), a case upon which Brown-Forman

relies, the Court stated that the statute of limitations would not be tolled "in instances where a worker discovers that a physically disabling injury has been sustained, [and] knows it is caused by work." (Emphasis added.) Although Upchurch was aware of her disabling condition for more than two years prior to the filing of her claim, she was not aware of its connection to her work. There is no dispute that she was misinformed -- by an agent of her employer -- that there was no such connection. Under these circumstances, the Board did not err in applying the doctrine of equitable estoppel to toll the limitations period in order to prevent an unfair advantage to Brown-Forman as a result of the erroneous statements made by its own doctor.

Brown-Forman next argues that the Board erred in rejecting its contention that the ALJ should have excluded the opinions of Drs. Gupta and Sheridan on the issue of causation. The essence of its argument is that all the experts who testified in this matter, including those who testified for Upchurch, agreed that the majority of persons afflicted with damage to the scapholunate ligament have usually suffered a significant trauma. In support of its argument for rejecting these opinions, Brown-Forman notes as follows: (1) Upchurch's doctors were unable to cite any medical articles subject to peer review to support their opinions that Upchurch's condition was related to her work; and (2) Dr. Gupta testified that he had treated only five or six patients to whom he attributed an occupational rather than traumatic cause for the degenerative changes in their wrists. Therefore, Brown-Forman contends that those opinions should have

been excluded as unreliable pursuant to the standards for admission of expert testimony set forth in Daubert and its progeny. Again, we believe the Board's reasoning is sound.

The Board agreed with Brown-Forman that it is necessary to establish causation of an injury by expert testimony unless it would be apparent to a lay person. Mengel v. Hawaiian-Tropic Northwest & Central, Ky.App., 618 S.W.2d 184 (1981). However, in the context of workers' compensation, the Board held that it is not necessary for the claimant to establish that the cause of her disabling condition is universally recognized by or agreed upon by the medical community. We agree. We conclude that the medical opinion testimony as to repetitive-injury causation should not have been excluded either because no medical articles were presented or due to the non-occurrence of an isolated traumatic event as the more common cause of such an injury.

There is no dispute that an expert's opinion must be reliable in order to substantiate a finding of the ALJ upon review. See, Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). To obtain an award of benefits for an injury, a claimant must present medical evidence of a work-related harmful change based on "objective medical findings." Staples, Inc. v. Konvelski, Ky., 56 S.W.3d 412, 415 (2001). However, the Kentucky Supreme Court has held that it was not persuaded "that KRS 342.0011(1) requires causation to be proved by objective medical findings." Id. at 416. Therefore, we believe it is wholly appropriate to weigh the testimony of a doctor who has observed, tested, and treated the claimant and accordingly has arrived at

an opinion as to the cause of her harmful change based on those observations and the patient's history. We hold that peer-reviewed material or published studies as to causation are not necessary components or bases to qualify the reliability of a medical opinion derived from the history of direct treatment and diagnosis of a patient.

Dr. Gupta testified that he was aware of the work performed by Upchurch throughout her long tenure with Brown-Forman. It was his opinion, expressed in terms of a reasonable degree of medical probability, that Upchurch's degenerative wrist condition and the loss of cartilage which he observed during surgery were caused by the repetitive work she had performed. We agree with the Board that this evidence was reliable and sufficient to support the ALJ's findings and award.

Our opinion on appeal has rendered moot Upchurch's contention on cross-appeal that the ALJ erred in striking certain medical articles. These documents were attached to the affidavit of Dr. Sheridan, which was prepared and submitted after his deposition.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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