RENDERED: November 26, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2003-CA-001214-WC

DAVID ARVIN — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD CLAIM NOS. WC-02-00973 & WC-02-0975

MOUNTAIN CONSTRUCTION COMPANY;
HONORABLE DONALD G. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION

AFFIRMING

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BEFORE: McANULTY and SCHRODER, Judges; HUDDLESTON, Senior Judge.[1]

HUDDLESTON, Senior Judge. David Arvin petitions for review of an opinion of the Workers' Compensation Board, which affirmed the decision of an Administrative Law Judge that awarded him partial disability benefits on his claim involving carpal tunnel

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580. This opinion was prepared and concurred in prior to the expiration of the Special Judge assignment on November 25, 2003.

syndrome but denied his claim based on hearing loss for failure to follow medical advice. Arvin challenges the denial of his hearing loss claim and the failure to increase his award on the carpal tunnel syndrome claim under the statutory multiplier in Kentucky Revised Statute (KRS) 342.730(1)(c)1.

Arvin, who was born in 1948, has a work history as a truck driver, manual laborer, backhoe operator, janitor, and carpenter in mine construction. He worked for Mountain Construction from 1977 through 1983, and returned in 1990 working as a backhoe operator until he quit in February 2002.

In 1971, while employed at L & M Corporation, Arvin suffered severe hearing loss in his left ear from a dynamite blast incident. At that time, Dr. Albert Cullum, an ontolaryngologist, began treating Arvin and fitted him for a hearing aid in his left ear. Arvin told Dr. Cullum that he had experienced hearing problems since the age of 17. Arvin settled a workers' compensation claim that resulted in payment of benefits based on a 25% permanent partial disability rating.

In July 1984, Arvin was struck on the right side of his head by a tree limb while working at a lumber company. This incident resulted in a total loss of hearing in the left ear and diminished hearing in the right ear. Arvin was examined by Dr. W. G. Begley, an ontolaryngologist, and Janet Martis, an audiologist. Auditory testing indicated an 88% combined hearing

loss following the incident. In January 1989, Arvin was awarded workers' compensation benefits and medical expenses based on a finding that he had sustained an 85% occupational disability, which the ALJ apportioned 30% to the employer, 30% to the Special Fund (based on a preexisting dormant hearing loss diagnosed in adolescence and the cumulative effect of loud noises experienced while employed by other prior employers), and 25% to preexisting active occupational disability.

On June 18, 2001, Arvin returned to Dr. Cullum stating his hearing had worsened. At that time, Dr. Cullum advised Arvin to cease exposure to loud sound such as heavy machinery. On April 16, 2002, Dr. Cullum performed audiometric tests that indicated severe to profound bilateral sensorineural hearing loss, total in the left ear and near total in the right with extremely poor speech discrimination. Dr. Cullum assessed a 35% functional impairment under the American Medical Association Guides to Evaluation of Permanent Impairment (AMA Guidelines) related to noise exposure in the workplace.

Meanwhile, on September 21, 2001, Dr. Robert Woods, an otolaryngologist, examined Arvin and found that he suffered from profound hearing loss and poor speech discrimination in his right ear, and no hearing in his left ear. He opined that the majority of his hearing loss probably was attributable to his previous hearing loss in adolescence and from the 1971 and 1984

incidents, but he was unable to assign a percentage attributable to noise exposure in the workplace.

On September 25, 2002, Dr. Ian Windmill, an audiologist, performed a university evaluation pursuant to KRS 342.315. Dr. Windmill found profound bilateral hearing loss probably related to workplace noise. He assessed a 35% permanent functional impairment under the AMA Guidelines.

In 1997, Arvin complained of pain, numbness, and tingling in his hands and wrists to his family physician, Dr. A. Dahhan, who referred him to Dr. Phillip Tibbs, a neurosurgeon. Dr. Tibbs diagnosed carpal tunnel syndrome bilaterally with some tendonitis evidenced by an EMG performed on December 1, 1997. Dr. Tibbs recommended surgery but Arvin decided to forego surgery and instead wore a brace periodically and took pain medication.

In May 2002, Arvin was seen by Dr. David Muffly, an orthopedic surgeon, with continuing complaints of pain, stiffness, and tingling in his hands. Dr. Muffly's examination revealed reduced grip strength, and positive Tinel and Phalen tests. Consistent with a nerve conduction test, Dr. Muffly diagnosed moderate bilateral carpal tunnel syndrome directly related to the repetitive use of his hands during his years of employment at Mountain Construction and he assessed a 6% functional impairment rating. Dr. Muffly suggested possible

carpal tunnel release surgery and treatment with braces and medications.

On May 31, 2002, Arvin filed an Application for Resolution of Injury Claim (No. 02-00793) based on the condition of his hands and wrists diagnosed as carpal tunnel syndrome. On June 6, 2002, he filed an Application for Resolution of Hearing Loss Claim (No. 02-00975). The two claims were consolidated with Mountain Construction contesting several issues including, inter alia, a defense to the hearing loss claim based on failure to follow medical advice. On July 11, 2002, Mountain Construction deposed Arvin. On October 28, 2002, an evidentiary hearing was held with Arvin as the only witness. He testified that the first time that Dr. Cullum told him to avoid exposure to loud noise such as heavy machinery was on his June 18, 2001, visit. He also stated that he felt he could no longer perform his job because of his hearing and hand conditions.

On December 17, 2002, the ALJ entered an opinion and award granting Arvin income and medical benefits associated with his carpal tunnel syndrome claim based on a 6% impairment rating for a period of 425 weeks. The ALJ credited the testimony of Dr. Cullum and Dr. Windmill in finding that Arvin had experienced an increase in hearing loss since 1984 as a result of continued exposure to noise at work from operating heavy equipment. However, he denied the hearing loss claim based on

Arvin's failure to follow medical advice to avoid environments with noisy heavy machinery. The ALJ also found that Arvin was not totally disabled and could return to his prior employment. The Workers' Compensation Board affirmed the ALJ's decision on appeal. This petition for review followed.

In a workers' compensation action, the employee bears the burden of proving every essential element of a claim.[2] As the fact-finder, the ALJ has the authority to determine the quality, character, and substance of the evidence.[3] Similarly, the ALJ has the sole authority to determine the weight and inferences to be drawn from the evidence.[4] The fact-finder also may reject any testimony and believe or disbelieve various parts of the evidence even if it came from the same witness.[5] When the decision of the fact-finder is in favor of the party with the burden of proof, the issue on appeal is whether the ALJ's decision is supported by substantial evidence, which is defined

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[2] Burton v. Foster Wheeler Corp., Ky., 72 S.W.3d 925, 928 (2002); Gibbs v. Premier Scale Co./Indiana Scale Co., Ky., 50 S.W.3d 754, 763 (2001); Jones v. Newberg, Ky., 890 S.W.2d 284, 285 (1994).

[3] Burton, supra at 928; Square D Co. v. Tipton, Ky., 862 S.W.2d 308, 309 (1993); Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985).

[4] Miller v. East Kentucky Beverage/Pepsico, Inc., Ky., 951 S.W.2d 329, 331 (1997); Luttrell v. Cardinal Aluminum Co., Ky. App., 909 S.W.2d 334, 336 (1995).

[5] Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88, 96 (2000); Whittaker v. Rowland, Ky., 998 S.W.2d 479, 481 (1999); Halls Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327, 329 (2000).

as some evidence of substance and consequence sufficient to induce conviction in the minds of reasonable people.[6] Where the party with the burden of proof is not successful before the ALJ in a workers' compensation matter, the issue on appeal is whether the evidence in that party's favor is so compelling that no reasonable person could have failed to be persuaded by it.[7] The ALJ has broad discretion in determining the extent of occupational disability.[8] A party challenging the ALJ's factual finding must do more than present evidence supporting a contrary conclusion to justify reversal.[9] Upon review of the Board's decision, the appellate court's function is limited to correcting the Board only where the reviewing 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.[10]

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[6] Transportation Cabinet v. Poe, Ky., 69 S.W.3d 60, 62 (2001); Whittaker, supra at 481-82; Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

[6] Carnes v. Tremco Mfg. Co., Ky., 30 S.W.3d 172, 176 (2000); Bullock v. Peabody Coal Co., Ky., 882 S.W.2d 676, 678 (1994).

[8] Commonwealth v. Guffey, Ky., 42 S.W.3d 618, 621 (2001); Cal Glo Coal Co. v. Mahan, Ky. App., 729 S.W.2d 455, 458 (1987); Thompson v. Fischer Packing Co., Ky. App., 883 S.W.2d 509, 511 (1994).

[9] Poe, supra at 62; Ira A. Watson Dep't Store v. Hamilton, Ky., 34 S.W.3d 48, 52 (2000).

[10] Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687 (1992). See also Phoenix Manufacturing Co. v. Johnson, Ky., 69 S.W.3d 64, 67 (2001); Huff Contracting v. Sark, Ky. App., 12 S.W.3d 704, 707 (2000).

Arvin raises two issues concerning the denial of his hearing loss claim and whether he was entitled to increased benefits for his carpel tunnel cumulative trauma injury based on an inability to perform the same type of work as before the injury. The ALJ denied Arvin's hearing loss claim based on the statutory defense of failure to follow medical advice.

KRS 342.035(3) provides in pertinent part:

> No compensation shall be payable for the death or disability of an employee if his death is caused, or if and insofar as his disability is aggravated, caused, or continued, by an unreasonable failure to submit to or follow any competent surgical treatment or medical aid or advice.

There are three elements necessary to establish the affirmative defense provided under this statute: (1) an employee's failure to follow competent medical advice; (2) the employee's failure was unreasonable; and (3) the unreasonable failure caused the disability.[11] The employer, who is the party asserting the affirmative defense, bears the burden of establishing all of the elements of the defense.[12] "Refusal to submit to treatment is unreasonable if it 'is free from danger to life and health and extraordinary suffering, and according to the best medical or surgical opinion, offers a reasonable

[11] See Luttrell v. Cardinal Aluminum Co., Ky. App., 909 S.W.2d 334, 336 (1995).

[12] See, e.g., Teague v. South Central Bell, Ky. App., 585 S.W.2d 425, 428 (1979).

prospect of restoration or relief from the disability.'"[13] Each of the elements constitutes a question of fact for the ALJ.[14] "Medical advice" under the statute encompasses advice from medical professionals that, if followed, would have prevented further injury or disability, in addition to specific advice concerning treatment of an injury or disease.[15]

In the current case, the ALJ found that Arvin's failure to follow the medical advice to avoid environments involving noisy heavy equipment after the 1984 injury caused an increase in his hearing loss while he was employed by Mountain Construction. Both Dr. Cullum and Dr. Windmill attributed his increased deterioration in hearing ability to exposure to noise in the workplace. Based on a comparison of audiometric tests conducted in 1987 and 2002, Dr. Windmill assessed a 3% increase in hearing loss because of loud noise in Arvin's work environment. Dr. Windmill also testified that any advice to Arvin following the 1984 incident to avoid noisy machinery to prevent further deterioration of his already limited hearing was reasonable.

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[13] Luttrell, supra at 336 (quoting Fordson Coal Co. v. Palko, 282 Ky., 397, 138 S.W.2d 456, 459 (1940)).

[14] See, e.g., id.; Teague, supra; Beth-Elkhorn Corp. v. Epling, Ky., 450 S.W.2d 814, 816 (1970).

[15] See Allen v. Glenn Baker Trucking, Inc., Ky., 875 S.W.2d 92, 94 (1994).

While Arvin does not contest the issues of reasonableness and causation, he does question the finding that he failed to follow any such medical advice. In reaching his decision, the ALJ relied primarily on Dr. Cullum's treatment records and portions of the 1989 Order awarding Arvin workers' compensation disability benefits on his prior hearing loss claim. The pertinent sections of the 1989 Order state as follows:

> 4. Dr. Albert G. J. Cullum, plaintiff's treating physician since prior to the 1971 injury, testified that plaintiff consulted him about the decreased hearing in his right ear on September 4, 1984 and related a history of a work-related blow to the head on July 23, which broke the hearing aid that he was wearing at the time. Plaintiff related to Dr. Cullum that his hearing had faded in and out after the accident and had disappeared completely from his right ear a few days prior to September 4, 1984.
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> Dr. Cullum stated that plaintiff had a permanent hearing loss of 100% in the right ear and a profound hearing loss in the left ear and should avoid environments, such as the one involving noisy heavy machinery, in order to prevent any further damage to the hearing, which he has retained in his left ear.
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> 5. Both Dr. W. G. Begley, an ontolaryn-gologist, and Janet Martis, an audiologist employed by Dr. Begley testified on behalf of Bell.
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> . . . .

> 7. There is no dispute between medical authorities as to the need to avoid loud noises, including heavy machinery.

Alvin testified that Dr. Cullum did not tell him to avoid noisy heavy machinery until his June 2001 examination. He also correctly points out that the 1989 Order does not explicitly state that Dr. Cullum told him to cease working with heavy machinery. However, Dr. Cullum's treatment records conflict with Arvin's testimony. For instance, the entry for an October 29, 1971, examination states: "The chief complaint is that of severe hearing loss, with poor discrimination. This was first noted at about the age of 17, becoming progressively worse . . . . He does work in relatively loud noise, using back hose (sic) and other heavy machinery. In addition, Lee's sonic ear valves are prescribed, and avoidance of occupational evnironmental (sic) noise is strongly recommended. The patient states that he will consider the possibilities of changing occupation." The entry for an April 10, 1973, visit states, "Advised to continue to abstain from noisy environments (states that he had the possibility of obtaining employment in a factory in Frankfort)."

While direct deposition testimony from Dr. Cullum would have been preferable, we cannot say that the ALJ's finding that Arvin failed to follow medical advice was not supported by substantial evidence. As the fact-finder, the ALJ is authorized

to determine the credibility of witnesses and draw reasonable inferences from the record. Despite Arvin's testimony, given the conflicts in the record and the numerous recommendations expressed by the medical personnel as evidenced by the 1989 Order, the ALJ did not err in finding that Mountain Construction satisfied its burden of showing that Arvin failed to follow reasonable medical advice.

Arvin also challenges the ALJ's failure to award additional disability benefits pursuant to KRS 342.730(1)(c), which provides for enhancement of benefits by a factor of three for permanent partial disability if due to an injury an employee does not retain the physical capacity to return to the type of work that he was performing at the time of his injury. The question of whether an employee retains the capacity to return to his pre-injury employment is a question of fact.[16] Because Arvin has the burden of proof on this element of his claim, the ALJ's decision must be upheld absent compelling evidence to the contrary. Arvin testified that he is unable to perform his past work because he cannot continuously use his hands to operate the control levers on a backhoe. He argues that the combination of his "uncontradicted" testimony and Dr. Muffly's diagnosis of

[16] See Carte v. Loretto Motherhouse Infirmary, Ky. App., 19 S.W.3d 122, 126 (2000).

carpal tunnel syndrome "clearly established" his right to the KRS 342.730(1)(c)(1) multiplier.

As indicated earlier, the ALJ has discretion in assessing the extent and duration of disability.[17] Neither Dr. Tibbs, nor Dr. Muffly opined that Arvin was unable to return to his previous employment. They both suggested possible surgical treatment and Dr. Muffly recommended treatment with braces and medication, but as the ALJ noted, neither placed restrictions on Arvin that would have prevented him from returning to his pre-injury employment. Furthermore, Arvin testified that he could operate a manual transmission on his vehicle, handle carpentry tools, and manipulate fishing equipment with little difficulty. We agree with the Board that the evidence does not compel reversing the ALJ's finding that Arvin could return to his prior type of employment. The Board has not overlooked or misconstrued controlling law nor erred in assessing the evidence so flagrantly as to cause gross injustice.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ronald C. Cox

BRIEF FOR APPELLEE:

Walter Ward

[17] See supra note 8.

Harlan, Kentucky

Lexington, Kentucky