RENDERED: NOVEMBER 23, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2005-CA-001567-WC

JERRY L. WILSON — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-04-00757

THYSSENKRUPP BUDD COMPANY;
HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: GUIDUGLI, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: Jerry L. Wilson appeals from a June 24, 2005, opinion and order by the Workers' Compensation Board (Board) affirming a February 11, 2005, order by the Administrative Law Judge (ALJ) dismissing his claim for benefits from his employer, ThyssenKrupp Budd Company (ThyssenKrupp). Wilson contends that

the issue of causation was not properly before the ALJ, that the evidence was uncontradicted that his carpal tunnel syndrome was caused by his employment, and that the ALJ applied the wrong standard to determine causation. We agree with Wilson that the ALJ mischaracterized the proof necessary to establish causation. Hence, we reverse the Board and remand for further findings by the ALJ.

Wilson began working as a production associate/welder for ThyssenKrupp in June 2000. Prior to working for ThyssenKrupp, Wilson served in the Army for twenty years, and in a military-related job for several years thereafter. During his service in the military, Wilson broke his ankle (in 1976), sustained a knee injury (in 1984), and sustained a back injury (in 1993). He re-injured his back in 1997 in a motor vehicle accident. Wilson testified he continued to have back symptoms depending on the amount of activity. In June 2001, while working for ThyssenKrupp, Wilson sustained a right shoulder injury and underwent treatment for a rotator cuff condition. Wilson testified he was given medication and placed on light duty, and the problem resolved. He re-injured the shoulder in a motor vehicle accident in August 2001, and underwent right shoulder surgery in October 2001.

Wilson was assigned to a station using an air tool and a grinder during the spring of 2002. He testified that he began

experiencing numbing sensations in his right hand in April. Wilson also testified the numbness continued when he took a break and his hand swelled to the point he could not close it. Wilson tendered his resignation on May 10, 2002, informing ThyssenKrupp that he could no longer perform his job duties due to the problems with his hands. He has not returned to paid employment since that time.

Wilson first saw Dr. Joseph Mesa for complaints of carpal tunnel syndrome on May 21, 2002. He explained he saw Dr. Mesa that day for follow-up for his shoulder surgery and advised his doctor of the right hand symptoms. Dr. Mesa performed carpal tunnel release on April 5, 2004, and released Wilson to physical activities in June 2004.

Dr. Mesa diagnosed Wilson with bilateral carpal tunnel syndrome, worse on the right than left. He rated Wilson's impairment at 1%. Based on Wilson's work-history involving repetative motion and use of vibratory tools, Dr. Mesa opined that Wilson's employment was responsible for at least some of the carpal tunnel symptoms, but he was unable to specify the degree to which Wilson's work contributed to the condition.

On cross-examination, Dr. Mesa was asked whether it would be an indication there were other factors involved in his symptoms if an individual continued to have symptoms two years after he was no longer doing the specific work. Dr. Mesa

replied, “[t]here could be other factors.” He explained there would not be any way to discern what portion was due to work and what portion was due to other factors. Dr. Mesa agreed that the continuation of symptoms after stopping work, and even increasing over a period of two years after being out of the working environment could be an indication other factors were playing a part, if not a material part, of the problem. On re-direct examination, however, Dr. Mesa stated that he could not relate Wilson’s carpal tunnel syndrome to any specific non-work related factors.

The ALJ also considered the records of Dr. Paresh Sheth, who treated Wilson in 2003. The records of Dr. Sheth indicate Wilson was seen on December 1, 2003, for nerve conduction studies of bilateral upper extremities. Dr. Sheth received a history of 1 ½ years of hand numbness, tingling and pain gradually worsening. EMG/NCV studies were abnormal and consistent with bilateral mild carpal tunnel syndrome with involvement of bilateral median sensory fiber at the wrist level. There was no mention in Dr. Sheth’s records of Wilson’s carpal tunnel syndrome originating from his work.

After reviewing the lay and medical evidence, the ALJ found that Wilson was suffering from bilateral carpal tunnel syndrome. However, the ALJ was not persuaded that Wilson met

his burden of proving that the condition was caused by his work for ThyssenKrupp:

> Carpal tunnel syndrome, unlike in the case of an amputation, for example, is not a condition for which causation can be inferred. As Dr. Mesa correctly set forth in his testimony only, carpal tunnel syndrome is a condition that can be multi-factorial. In fact, Dr. Mesa could not state within reasonable medical probability that the Plaintiff's bilateral carpal tunnel syndrome was caused by his work. The best he could say was that the work at least in part aggravated or perhaps even brought it into disabling reality.
> However, Dr. Mesa could not state within reasonable medical certainty that it was the direct and proximate cause.

Based on this finding, the ALJ dismissed Wilson's claim for benefits. On appeal, the Board affirmed the ALJ in a two-to-one opinion. A majority of the Board found that the evidence of work-relatedness did not compel a finding in Wilson's favor.

On appeal to this Court, Wilson again argues that the ALJ erred by finding that he had failed to prove that his carpal tunnel syndrome was causally related to his work. Wilson first argues that ThyssenKrupp did not contest the issue of causation, and consequently the ALJ should not have considered it. After reviewing the record, the Board found, and we agree, that the issue of causation was properly before the ALJ:

> We disagree with Wilson that the issue of causation was not preserved despite the fact

> that ThyssenKrupp did not argue lack of causation in its brief before the ALJ. ThyssenKrupp, in its Form 111, denied Wilson's claim on the grounds the injury "did not arise out of and in the course of employment." Further, the Benefit Review Conference order and memorandum entered on December 9, 2004 specifically identified "work relatedness/causation" as a "contested issue."

ThyssenKrupp does not contest the ALJ's finding that Wilson is suffering from bilateral carpal tunnel syndrome. The only issue concerns the sufficiency of Wilson's proof on the issue of work-relatedness. The Board majority held that:

> Since Wilson, the party with the burden of proof, was unsuccessful on the issue of work causation, the issue on appeal is whether the evidence on which he relies is so compelling as to require the result he seeks as a matter of law. Snawder v. Stice, [356 S.W.2d 276, 279-80 (Ky.App. 1979)], Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky.App. 1984). The ALJ, as fact finder, has the sole authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Furthermore, the ALJ has the absolute right to believe part of the evidence and disbelieve other parts, whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). It is not enough to show that there is some evidence which would support a contrary conclusion. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). So long as the ALJ's opinion is supported by any evidence or substance, ordinarily we may not reverse. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

> When the cause of a condition is not readily apparent to a lay person, medical testimony supporting causation is required. Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981). Medical causation must be proven by medical opinion within "reasonable medical probability." Lexington Cartage Co. v. Williams, 407 S.W.2d 395 (Ky. 1966). The mere possibility of work-related causation is insufficient. Pierce v. Kentucky Galvanizing Co., Inc., 606 S.W.2d 165 (Ky.App. 1980).

The Board majority agreed that Dr. Mesa's testimony would support a finding of work-relatedness, but concluded that it did not compel a finding in Wilson's favor. The dissenting member Stanley agreed with this analysis, but was troubled by the ALJ's statement that "[c]arpal tunnel syndrome … is not a condition for which causation can be inferred". The dissenting member was concerned that the ALJ limited himself to considering only medical evidence of causation, and improperly discounted inferences from the medical and lay testimony that would support a finding of work-relatedness.

We agree. In Union Underwear Co., Inc. v. Scearce,[1] the Supreme Court affirmed a decision by an ALJ who relied on a combination of medical testimony and the work history provided by the injured worker. The ALJ's decision was affirmed as being supported by substantial evidence, even though the

[1] 896 S.W.2d 7 (Ky. 1995).

uncontradicted medical opinion was that the condition was not work-related. Although the ALJ must consider the worker's medical condition when determining the extent of his occupational disability at a particular point in time, the ALJ is not required to rely on the vocational opinions of either the medical experts or the vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured.[2]

More recently, in Dravo Lime Co., Inc. v. Eakins,[3] the Kentucky Supreme Court again emphasized that a finding of causation need not be based solely on a physician's opinion.[4] Rather, an ALJ has the authority to infer causation based upon all properly admitted evidence.[5] Consequently, the ALJ erred in stating that the causation of Wilson's carpal tunnel syndrome could not be inferred.

The clear-error standard applies to a review of an ALJ's findings of fact.[6] A majority of the Board and the dissenting Board member agreed that there was evidence which would support a finding either that Wilson's carpal tunnel

---

[2] *Id.* at 9.

[3] 156 S.W.3d 283 (Ky. 2005).

[4] *Id.* at 289.

[5] *Id.*

[6] *See* Miller v. Eldridge, 146 S.W.3d 909, 915 (Ky. 2004).

syndrome was work-related or that it was not. But it is not sufficient that the ALJ's ultimate result is within a range which the evidence would support if the ALJ did not apply the correct legal standard in reaching that conclusion. The result is arbitrary even if the evidence could justify the ultimate conclusion.

Because the ALJ applied an incorrect standard in assessing the evidence, we agree with the dissenting member of the Board that this case must be remanded for additional findings. KRS 342.0011(1) defines an injury under the Act as 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 change in the human organism. Wilson is not required to identify a single source of causation for his injury or condition before being entitled to recover benefits under the Act.[7] Where work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change. Hence, the harmful change comes within the definition of an injury.[8] If the

[7] *See* Ryan's Family Steakhouse v. Thommason, 82 S.W.3d 889 (Ky. 2002) and McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001).

[8] McNutt Construction/First General Services v. Scott, *supra* at 859.

ALJ concludes that Wilson's work activities contributed to the development of his carpal tunnel syndrome, then Wilson would be entitled to benefits under the Act. But if the ALJ reaches a contrary conclusion after a proper consideration of the inferences which may reasonably be drawn from all of the evidence, then Wilson's claim must be dismissed again.

Lastly, Wilson argues that the ALJ failed to recognize that causation may be proven based upon a "differential diagnosis". A reliable differential diagnosis typically, though not invariably, is performed after physical examinations, the taking of medical histories, and the review of clinical tests, accomplished by determining the possible causes for the patient's symptoms and then eliminating each of these potential causes until reaching one that cannot be ruled out or determining which of those that cannot be excluded is the most likely.[9]

As previously noted, the ALJ is entitled to draw reasonable inferences from the evidence to support a finding of causation. Differential diagnosis is an acceptable method of determining causation.[10] Thus, the ALJ may consider a differential diagnosis in determining causation. But the ALJ is

[9] Hardyman v. Norfolk & Western Railway Co., 243 F.3d 255, 260 (6th Cir. 2001).

[10] *Id.* at 261.

not required to do so if Wilson's proof does not establish causation within a reasonable degree of probability.[11]

Accordingly, the June 24, 2005, opinion and order by the Workers' Compensation Board is reversed, and this matter is remanded to the ALJ for additional findings as set forth in this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT
JERRY L. WILSON:

Harlan E. Judd, III
Wyatt, Tarrant & Combs, LLP
Bowling Green, Kentucky

BRIEF FOR APPELLEE
THYSSENKRUPP BUDD COMPANY:

G. Kennedy Hall, Jr.
Bradley E. Cunningham
Middleton & Reutlinger
Louisville, Kentucky

[11] In its brief, ThyssenKrupp notes that it also asserted that Wilson failed to give timely notice of the injury as required by KRS 342.185(1). Having decided the claim based solely on the issue of causation, the ALJ declined to reach this issue. On remand, however, timeliness of notice will be an issue for the ALJ to determine.