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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001612-WC

SARGENT & GREEN LEAF — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-07-75170

DONALD G. QUILLEN;
HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND VANMETER, JUDGES; SHAKE,[1] SENIOR JUDGE.

VANMETER, JUDGE: Sargent & Green Leaf ("Sargent") petitions for review of an opinion of the Workers' Compensation Board ("Board") which affirmed an

[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

opinion of the Administrative Law Judge ("ALJ") awarding benefits to Donald G. Quillen for contraction of an occupational disease. Finding no error, we affirm.

Beginning in 1994, Quillen worked as a tool and die maker at Sargent. As part of his work, he routinely cleaned tools and machine parts in a washer with a cleaning solvent containing the chemical benzene. He used the washer daily, from two to twelve times a day, for five to thirty minutes at a time, regularly inhaling fumes from, and having extensive dermal exposure to, the cleaning solvent.

On March 31, 2007, Dr. Monty Metcalfe, a hematologist, diagnosed Quillen with myelodysplastic syndrome ("MDS") and advised him to immediately cease working at Sargent, which he did. Thereafter, Quillen filed a workers' compensation claim alleging that he contracted MDS as a result of his exposure to benzene while employed with Sargent.

The ALJ conducted a hearing on the matter and determined that Quillen had sustained a permanent total disability from an occupational disease. Sargent filed a petition for reconsideration, which the ALJ denied. Sargent then appealed the ALJ's decision to the Board, which affirmed both the ALJ's award and its denial of Sargent's petition for reconsideration. This appeal followed.

The standard for appellate review of a Board decision "is limited to correction of the ALJ when the ALJ has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky.App. 2009) (citing *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky.

1992)). We review an award by the ALJ to determine whether its findings were reasonable under the evidence. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). We note that the "ALJ, as the finder of fact, and not the reviewing court, has the sole authority to determine the quality, character, and substance of the evidence." *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993) (citation omitted).

First, Sargent claims the evidence does not support the ALJ's finding that Quillen's contraction of MDS was causally attributable to his work activities. We disagree.

Per KRS 342.0011(3),

> An occupational disease . . . shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident to the work as a result of the exposure occasioned by the nature of the employment and which can be fairly traced to the employment as the proximate cause.

Furthermore, "[m]edical causation must be proved to a reasonable medical probability." *Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93, 106 (Ky. 2008) (citations omitted).

In this case, the record reflects that voluminous medical and lay evidence was taken on the issue of causation. The ALJ relied on the medical opinions of Drs. Rogers, Prince and Metcalfe, as well as the testimony of Quillen, to find the existence of a causal relationship. Quillen's testimony confirmed that the cleaning

solvent he used at Sargent contained the chemical benzene and that he used the washer more frequently than any other Sargent employee. Despite the fact that he wore gloves while cleaning, the solvent splashed onto his hands and forearms. And although he was required to wear safety glasses with shields in order to prevent the solvent from splashing into his eyes, he was not required to wear a respirator or mask. Other than use of his automobile and power tools, Quillen could not identify any other source that may have exposed him to benzene.

Dr. George C. Rogers, a pediatrician and toxicologist, prepared a report in which he opined within reasonable medical probability that Quillen's MDS was causally related to his work environment, due to his extensive exposure to the solvent containing benzene. Dr. Rogers was of the opinion that Quillen had no other identified risk factors for MDS and no other known exposure to benzene other than his workplace exposure.

Dr. Scott Prince, a designated university evaluator whose opinion must be given presumptive weight pursuant to KRS 342.315,[2] reviewed Quillen's history, including his employment history, and the course of treatment with Dr. Metcalfe. He also conducted a physical examination of Quillen. In his report, Dr. Prince opined within reasonable medical probability that Quillen's condition was related to his work environment, noting that Quillen's significant ongoing exposure to the solvent containing benzene would substantially raise the risk of developing MDS.

[2] Under KRS 342.315(2), "[e]xcept as otherwise provided in KRS 342.316, the clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by administrative law judges and the burden to overcome such findings and opinions shall fall on the opponent of that evidence."

Dr. Metcalfe, who initially diagnosed Quillen with MDS, indicated in his report that exposure to benzene is one of two major causes of MDS. Although the record reflects that a large number of MDS cases are idiopathic in origin, Dr. Metcalfe opined that Quillen's MDS was not clearly idiopathic; Quillen regularly inhaled fumes from, and had dermal contact with, the solvent containing benzene.

While the record discloses that Sargent presented evidence that could have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46 (Ky. 1974). Rather, reversal is appropriate only if no substantial evidence exists to support the ALJ's findings. *Special Fund*, 708 S.W.2d at 643. Upon review of the entire record, we are unable to say that the evidence did not support a finding that Quillen's MDS was causally attributable to his work activities.

Next, Sargent claims that contrary to the ALJ's findings, it did not waive its *Daubert* objection concerning the admissibility of Dr. Rodgers' medical report. Sargent further claims that Dr. Rogers' opinion on causation failed to rise to a level sufficient to be admissible under the *Daubert* standard. We disagree.

KRE[3] 702 governs the admissibility of expert testimony. It provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion

[3] Kentucky Rules of Evidence.

> or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Id.

In *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the United States Supreme Court held that under Fed.R.Evid.[4] 702, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589, 113 S.Ct. at 2795. The fact-finder is, thus, required to make an initial assessment "of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93, 113 S.Ct. at 2796.

The Kentucky Supreme Court has held that the *Daubert* standard with respect to the admissibility of expert opinion testimony is applicable in workers' compensation proceedings. *City of Owensboro v. Adams*, 136 S.W.3d 446, 449-50 (Ky. 2004). Further, the fact-finder is afforded great latitude in making a reliability determination and need not recite any of the *Daubert* factors so long as the record is clear that a *Daubert* inquiry was made. *Id.* at 451.

In this case, the ALJ held that Sargent was precluded from challenging the admissibility of Dr. Rogers' report after the final hearing since it failed to raise a *Daubert* objection prior to submission of this case for decision; Sargent challenged

[4] Federal Rules of Evidence.

the admissibility of Dr. Rogers' report for the first time in its post-hearing brief, and neither raised the issue at the benefit review conference conducted by the ALJ prior to the final hearing during which the ALJ identified all contested issues, nor during the final hearing itself. As a result, Quillen was not afforded an opportunity to present evidence on the reliability of Dr. Rogers' report under the *Daubert* standard. Accordingly, the ALJ concluded that Sargent waived its *Daubert* objection.

We agree that because the *Daubert* challenge was not raised at the benefit review conference and Quillen did not have a chance to present evidence in support of his position, Sargent's post-hearing challenge was untimely. *See* 803 KAR[5] 25:010, Section 13(14) ("Only contested issues shall be the subject of further proceedings."). In addition, assuming, *arguendo*, that Sargent's *Daubert* challenge was timely, the ALJ made a reliability determination sufficient to satisfy *Daubert*, based on Dr. Rogers' credentials and its finding that Dr. Rogers was the expert most qualified to opine on the issue of causation. Moreover, we note that the Board concluded that Dr. Rogers' use of a differential diagnosis methodology[6] to ascertain causation satisfies the standard for admissibility under *Daubert*. For these reasons, we cannot say that the ALJ improperly admitted and relied upon Dr. Rogers' testimony.

[5] Kentucky Administrative Regulations.

[6] Differential diagnosis "is a well-recognized and widely-used technique in the medical community to identify and isolate causes of disease and death." *Hyman & Armstrong*, 279 S.W.3d at 107 (citation omitted).

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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