IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: MAY 22, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE June 12, 03 ELAG-Frankfort, DC

2002-SC-0531-WC

REGINA K. MOORE — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2001-CA-2501-WC
WORKERS' COMPENSATION BOARD NO. 00-1290

VERSNICK HEALTHCARE CENTER, INC.;
HON. SHEILA C. LOWTHER, CHIEF
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) dismissed the claimant's application for workers' compensation benefits after determining that the only medical opinion with regard to causation was based upon an inaccurate history. Although the decision was affirmed by the Workers' Compensation Board (Board) and the Court of Appeals, the claimant continues to maintain that the ALJ erred by disregarding what she characterizes as the uncontroverted evidence of causation. We affirm.

The claimant became employed in the dietary department of a nursing home on May 7, 1999. She had been out of the workforce since September, 1997, but in the preceding 4 ½ years she had worked as a nurse's aide, cashier, store clerk, and stocker. She testified that she had one day's training after being hired and worked thereafter as a cook. As she described her duties, she was solely responsible for

cooking breakfast and lunch for 60-65 people, a task that involved repetitive activity with her hands such as stirring food, chopping vegetables, and slicing meat. When the food was prepared, she placed portions on individual trays (plates), put lids on them, stacked them on a service cart for delivery to the residents, and then cleaned the pots and pans that were used. She testified that after lifting a pan at work, she had experienced periodic numbness, pain, and tingling in her right hand for a couple of weeks. She informed her supervisor on August 6, 1999, at which time she also indicated that she had a medical appointment that morning.

The claimant continued to work and began to experience symptoms in her left arm. In October, 1999, she quit work altogether and underwent a right carpal tunnel release. The employer paid her medical expenses through July, 2000, and paid voluntary income benefits from August 7, 1999, through October 20, 2000, after which she filed a claim. At issue were causation/work-relatedness, the claimant's entitlement to additional temporary total disability benefits and medical benefits, and the extent of any permanent disability. Furthermore, although the employer stipulated to notice of a right wrist injury, due and timely notice of a repetitive trauma injury was contested.

Deborah Hopewell, the nursing home's personnel manager, testified that the claimant was hired as a dietary aide, one of three workers who were responsible for meal preparation, tray set-up, and dishwashing. At one time or another, the claimant would have performed each of those tasks. Hopewell testified that although most workers take about a week to train, the claimant was slow in learning the job and took about a month to do so. Taking issue with the claimant's deposition testimony, Hopewell emphasized that she did not do most of the cooking and also indicated that "for the first month, she was just a spectator." Hopewell indicated that on August 6,

1999, the claimant's supervisor informed her that the claimant had reported a right wrist injury but indicated that she had no personal knowledge of such an injury. The return to work notification from Dr. Crandell indicated that the claimant's problem was work-related and that she could return to work on August 9. An incident report was prepared on August 6, 1999, and indicated that the claimant complained of pain and numbness in her right wrist after lifting a pan.

Brenda Logan Drake, the dietary department supervisor, testified that the claimant was in training for her first month's employment. Drake indicated that she worked in the kitchen part of each day, that the three kitchen workers worked together, that their duties were interchangeable, and that the claimant never worked exclusively as a cook. Furthermore, the kitchen had a machine for chopping and dicing vegetables, and meat came in precut portions that seldom needed to be cut. Pots were filled while on the stove, and food was served directly onto service plates so that pots and pans were not lifted while they were heavy. Drake testified that she often worked side by side with the claimant and that the claimant never complained of hand or wrist problems until after returning from a doctor's appointment on August 6, 1999. At that time, she informed Drake that she had hurt her right wrist at work sometime earlier. She did not indicate that her problems were due to repetitive activities. Finally, Drake testified that the claimant worked only a few days between August 7, 1999, and her last day of work on October 7, 1999.

Dr. Kristy Crandell saw the claimant on August 6, 1999, at which time she complained that her right hand had been numb since 2:00 that morning. She reported that her symptoms had been present for about 1 ½ months and that her work involved a lot of repetitive activity such as stirring food and turning items on the grill. After

examining the claimant, Dr. Crandell diagnosed right carpal tunnel syndrome for which she prescribed medication and a wrist splint. The claimant's symptoms persisted as of August 20, 1999, at which point Dr. Crandell referred her to Dr. Bruce MacDougal for testing.

Dissatisfied with Dr. MacDougal's treatment, the claimant later sought treatment from Dr. Paul Perry, an orthopedic and hand surgeon. He first saw her on October 8, 1999, at which time she reported that she had been a cook and utility person for the nursing home for about 5 months. She indicated that, in July, she noticed a progressive onset of right arm symptoms that became severe by August 6, 1999, and led her to seek treatment. Dr. Perry testified that testing revealed mild to moderate carpal tunnel syndrome and that Dr. MacDougal's records characterized the arm as being "very vasoactive." Dr. Perry diagnosed atypical right carpal tunnel syndrome with early elements of reflex sympathetic dystrophy, and he recommended a right carpal tunnel release that was performed on October 18, 1999. Nonetheless, the hallmarks of sympathetic reflex dystrophy (disproportionate symptoms, vasoactive appearance, and shoulder discomfort) persisted, and a series of stellate ganglion blocks produced only a marginal response rather than the dramatic response that would normally be expected. In February, 2000, he referred the claimant to a pain management specialist because she complained that her symptoms had increased.

There was evidence that the claimant saw Dr. Breidenbach for a second opinion and that he recommended additional surgery which she declined. Dr. Perry did not think that further surgery was appropriate. When he last saw the claimant in July, 2000, she complained of intractable pain and numbness and of an intermittent discoloration of her hands. He noted that she exhibited symptoms of Reynaud's phenomenon and

recommended that she see a rheumatologist.

When deposed, Dr. Perry attributed the claimant's carpal tunnel syndrome to the repetitive nature of her work and thought that the reflex sympathetic dystrophy was secondary to the condition. He indicated that a two-month employment was sufficient to cause carpal tunnel syndrome if it involved a significant change in the frequency and intensity of hand activity, but he admitted that he had no specific information about the claimant's duties. Furthermore, her failure to respond to the ganglion blocks and the changes that were suggestive of Reynaud's phenomenon indicated that an autoimmune disorder such as lupus or rheumatoid arthritis might be the cause of her problems.

In reciting the medical evidence, the ALJ noted that the claimant's discovery deposition indicated that she was diabetic. Yet, neither Dr. Crandell nor Dr. Perry appeared to be aware of the condition although Dr. Perry did, at one point, recommend metabolic testing. The ALJ noted that Dr. Perry attributed the claimant's arm conditions to the repetitive nature of her work but also noted that he did not have detailed information concerning the specific nature of her duties. Furthermore, he thought that her symptoms developed after she had performed the work for about 2 months. Whereas, persuasive testimony from Ms. Hopewell and Ms. Drake indicated that the claimant was a spectator for the first month and that she performed a variety of work thereafter rather than repetitive work of the intensity and frequency that Dr. Perry had envisioned. For that reason, the ALJ rejected his opinion with regard to causation on the ground it was based upon an erroneous history and determined that the claimant failed to meet her burden of proving causation and work-relatedness.

Appealing, the claimant maintains that the discrepancies between her testimony and the testimonies of Ms. Hopewell and Ms. Drake were not so significant as to

warrant disregarding Dr. Perry's opinion. She points out that the present situation is a far cry from Osborne v. Pepsi-Cola, Ky., 816 S.W.2d 643 (1991), in which the worker testified to an injury but failed to report it to his employer or to the emergency room where he sought treatment for back pain. She maintains, therefore, that Osborne is not a proper basis for disregarding Dr. Perry's opinion. Furthermore, she asserts that because the causal relationship between her work activities and her medical condition was not one that is apparent to a layperson, the ALJ was required to rely upon the uncontradicted medical evidence. Elizabethtown Sportswear v. Stice, Ky.App., 720 S.W.2d 732 (1986); Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Ky.App., 618 S.W.2d 184 (1981).

The claimant had the burden of proving every element of her claim, including the fact that her disabling condition was work-related. As explained in Bullock v. Gay, 296 Ky. 489, 491, 177 S.W.2d 883, 885 (1944), uncontradicted testimony may be taken as conclusive if the witness is disinterested and credible, if the testimony concerns a fact that is not improbable or in conflict with other evidence, and if it addresses a matter that is within the witness's own knowledge. Dr. Perry's opinion that the claimant's condition was due to the repetitive nature of her work was based upon the history that she related to him, and he admitted that he had no knowledge of the specific duties that she performed. As the ALJ noted, the history did not include a diabetic condition with which she had been diagnosed in 1988. Furthermore, the claimant's description of her duties and the length of her training period varied significantly from those of Ms. Hopewell and Ms. Drake, giving rise to a controversy concerning the nature, duration, and intensity of the activities that she performed in the course of her work.

KRS 342.285 gives the ALJ the sole authority to judge the credibility of witnesses and to weigh the evidence with regard to questions of fact. Where the fact-finder determines that the party with the burden of proof failed to meet that burden, the decision may be reversed only if the evidence in that party's favor was so overwhelming that no reasonable person would fail to be persuaded by it. See Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). In view of the evidence that was presented, it was not unreasonable for the ALJ to conclude that Dr. Perry's opinion was formed in the belief that the claimant performed repetitive activities for a longer duration and with a greater intensity and frequency than actually occurred. Thus, the decision was properly affirmed on appeal.

The decision of the Court of Appeals is affirmed.

All concur.

COUNSEL FOR APPELLANT:

John S. Sowards, Jr.
Wilson, Sowards, Polites & McQueen
Suite 201
444 East Main Street
Lexington, KY 40507

COUNSEL FOR APPELLEE:

Denis S. Kline
3022 Eleanor Avenue
Louisville, KY 40205-2906