

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: September 18, 2003

NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2002-SC-0571-WC

DATE 10-9-03 EIA Grant, D.C.

BANK ONE

APPELLANT

APPEAL FROM COURT OF APPEALS

2002-CA-0543-WC

V.

WORKERS' COMPENSATION BOARD NO. 98-97899

VICKI BARNA; HON. DONALD G. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

After remanding this claim for additional findings of fact, the Workers' Compensation Board (Board) affirmed a finding that the claimant's AMA impairment was 19%. After a subsequent remand, the Board determined that the Administrative Law Judge (ALJ) stated a reasonable basis for disregarding the university evaluator's opinion with respect to causation. The Court of Appeals affirmed, but the employer maintains that the award is not supported by substantial evidence, that the university evaluator's testimony was improperly rejected, and that the impairment rating was not consistent with the AMA Guides. We affirm.

The claimant began working for the defendant-employer in March, 1997. Her work required her to sit with a calculator and computer, pick up checks, drop them into a transport machine, and encode the amounts. In November, 1997, she experienced pain in her left arm and the left side of her chest while operating the computer.

Thinking that she was having a heart attack, she informed her supervisor and sought medical treatment. She was diagnosed with bilateral carpal tunnel syndrome and thoracic outlet compression.

Dr. Gupta began treating the claimant in November, 1997. His initial records indicate that her condition was not work-related. At some point thereafter they indicate that it was work-related but state no basis for that conclusion. Dr. Gupta diagnosed bilateral carpal tunnel syndrome and performed surgery on each arm before referring her to Dr. Atasoy.

Dr. Atasoy treated the claimant for thoracic outlet compression and performed a left first rib resection. His records, like Dr. Gupta's, indicate that the condition is work-related but state no basis for that conclusion. In response to a letter from the claimant's attorney requesting an AMA impairment rating, Dr. Atasoy responded:

A permanent partial impairment rating has been calculated as follows: approximately 5% of the left upper extremity and 15-20% of the right upper extremity. This would be equal to approximately 19% of the total body.

With respect to causation, he responded:

Usually, thoracic outlet compression is a preexisting, dormant, nondisabling condition until aggravated either by repetitive use of the extremity or an injury. In the case of Ms. Barna, it is felt that the thoracic outlet compression became evident and was brought into disabling reality as a result of the repetitive nature of her work activities.

Dr. Jacob examined the claimant, reviewed the medical records, and testified for the employer. He noted that although the records revealed normal EMG/NCV results in February, 1998, the results were disregarded as false negatives, and carpal tunnel releases were performed in May and July of 1998. Dr. Jacob noted the change in Dr. Gupta's opinion concerning the cause of the condition and indicated that the records

had been modified after a telephone call from the claimant. Furthermore, he indicated that even performing the claimant's work activities on a continuous basis "would not and could not cause carpal tunnel or thoracic outlet syndrome." He thought that the claimant was at maximum medical improvement (MMI) but would assign no functional impairment.

Dr. Smith found no significant changes on EMG and no cervical radiculopathy. He thought that the claimant was at MMI from the carpal tunnel condition and had no significant impairment. Furthermore, he found no objective evidence of thoracic outlet compression from a neurogenic standpoint.

Dr. Lawton performed a university evaluation in January, 2000, as provided by KRS 342.315. He did not think that the claimant had reached MMI following the March, 1999, left first rib resection. He indicated that activities that were performed at waist level would not cause thoracic outlet syndrome or cervical radiculopathy. He thought it was conceivable that the claimant had a predisposition to develop thoracic outlet syndrome and that the development of the condition was "temporally related to her work, in that it happened while she was typing at a keyboard." Nonetheless, he found it difficult "to create a direct link between this day's activity typing and other days' activity typing where she did not develop symptoms of thoracic outlet syndrome." In his opinion, the claimant retained the physical capacity to return to the same work.

Relying upon Dr. Atasoy and noting that Dr. Lawton thought the claimant's symptoms were "temporarily" related to her work, the ALJ determined that the claimant sustained a work-related injury and that her AMA impairment was 19%. The Board reversed the decision and remanded the claim for further consideration under a correct understanding of Dr. Lawton's testimony and for an explanation of the basis for

disregarding his testimony since it was given in the capacity of a university evaluator. Furthermore the Board remanded for an explanation of the basis for determining that the 19% impairment rating was assigned according to the AMA Guides.

On remand, the ALJ noted that counsel for the claimant requested an AMA impairment and was persuaded that because Dr. Atasoy gave the 19% rating in response to that request, it was an AMA impairment. After summarizing the evidence of causation, the ALJ determined that the claimant met his burden of proof. Again the employer appealed. Although the Board affirmed with respect to the impairment rating, it explained that the ALJ failed to state a reasonable basis for choosing to disregard Dr. Lawton's opinion with respect to causation. KRS 342.315; Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88 (2000). Therefore, it reversed the finding of causation and remanded the claim again. The order on remand stated, in pertinent part, as follows:

The Administrative Law Judge continues to believe that the testimony from Dr. Gupta and Dr. Atasoy is more persuasive in that they have seen the Plaintiff on many occasions during their treatment. They are also the doctors that specifically performed the surgeries for the Plaintiff's carpal tunnel and thoracic outlet conditions. Dr. Lawton only examined the Plaintiff on one occasion. The Administrative Law Judge believes that seeing and treating a patient on multiple occasions places a medical provider in a better position to determine the patient's true condition and the cause for such a condition.

Although the employer appealed again, the Board affirmed. The Court of Appeals affirmed the Board, and this appeal by the employer followed.

Contrary to the employer's assertion, it is apparent that there was substantial evidence in the record to support the partial disability award. With respect to the sufficiency of the evidence, the mere fact that the award was remanded twice is of no particular significance. Like the Board, we are convinced that it was not unreasonable for the ALJ to infer from the available evidence that Dr. Atasoy assigned the 19% rating

under the Guides since he gave the rating in response to a request for an AMA rating. Whether the rating actually was consistent with the AMA Guides is a medical question to be proven with medical evidence and, here, no medical evidence was introduced to dispute Dr. Atasoy's methodology. Finally, like the Board, we are persuaded that the ALJ stated a reasonable basis for choosing to disregard Dr. Lawton's testimony with respect to causation. Where a physician has treated a patient on multiple occasions and where there is no evidence that the physician was given a defective history or an inaccurate description of a worker's duties, it is not unreasonable to conclude that the physician's opinion of causation is more reliable than that of a physician who has examined the worker only once.

The decision of the Court of Appeals is affirmed.

All concur.

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