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RENDERED: AUGUST 25, 2005

NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-0257-WC

DATE 9-15-05 E.A.G. + J.D.C.

JUDY SMITH

APPELLANT

APPEAL FROM COURT OF APPEALS

V.

2003-CA-1982-WC

WORKERS' COMPENSATION BOARD NO. 94-17471

PARKER SEAL COMPANY; HON. IRENE STEEN,
ADMINISTRATIVE LAW JUDGE; WORKERS'
COMPENSATION BOARD; ROBERT L. WHITTAKER,
DIRECTOR, DIVISION OF WORKERS'
COMPENSATION FUNDS

APPELLEES

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

In a reopening proceeding, the Administrative Law Judge (ALJ) determined that the claimant's initial award was ambiguous regarding the cause of her thumb joint arthritis, that work-relatedness must be determined at reopening, and that the more persuasive evidence attributed the condition to her age rather than her work. The claimant maintained on appeal that the cause of the condition was decided favorably in the initial proceeding, but the Court of Appeals and the Workers' Compensation Board (Board) affirmed. We disagree.

The claimant began working for the defendant-employer in March, 1969, as a press operator. She stated that the job required her to operate five presses that made O-rings. After each ring cured, she used an air hose with a thumb trigger to blow it off the press. She generally used her right hand to operate the press and to cut excess rubber from the ring molds with scissors. She had also used her right hand to operate

the air hose until it became painful, at which point she tried to use her left hand some. That was awkward because the press stations were set up for right-handed work.

In 1992, after 23 years at this job, the claimant experienced left hand pain and pain and numbness in her right hand and thumb. Dr. Travis diagnosed carpal tunnel syndrome in 1994. He later referred her to Dr. Einbecker, who performed a left carpal tunnel release in January, 1995. She testified that the surgery relieved the numbness in her left hand, but she still had mild pain. She also had a cramping, drawing pain that ran up her thumb into her arm. It was worse on the right and increased with use. She stated that she had right shoulder pain and that she was considering surgery on her right hand due to pain.

On May 3, 1994, Dr. Einbecker diagnosed bilateral carpal tunnel syndrome that was greater on the left side. He also diagnosed bilateral CMC thumb joint arthritis, noting that x-rays revealed significant degenerative arthritis that was worse on the right side. In January, 1995, Dr. Einbecker performed a left carpal tunnel release and injected the right wrist with cortisone. The claimant returned to work three months later. On June 6, 1995, Dr. Einbecker assigned a two percent (2%) whole-body impairment due to the left carpal tunnel release. He noted that he expected the claimant to develop tendinitis in the left forearm and the CMC joint of the right thumb. He prescribed Relafen and indicated that he would see her as needed. The claimant next sought treatment on March 18, 1997, complaining of pain in her thumbs. Dr. Einbecker noted that the condition resulted from "her several decades of working at the company with her hands." He continued to prescribe anti-inflammatory medication and stated that he would see her "on an as-needed basis."

Dr. Einbecker characterized the CMC joint arthritis as a "pre-existing condition" that was aroused by her work. He further explained that the referenced pre-existing

condition was a result of the natural aging process and the propensity for women, in general, to develop arthritis in this joint rather than a diagnosed pre-existing condition specific to this claimant.

Dr. Travis testified regarding EMG evidence of early carpal tunnel syndrome in the right wrist and moderate carpal tunnel syndrome in the left. He also noted a positive grind test in both thumbs. His notes did not address causation.

Dr. Zerga performed NCV/EMG studies in March, 1994. He testified that the claimant had left-sided carpal tunnel syndrome that had been successfully treated with surgery. He attributed the condition to the repetitive nature of her work and stated that it presently accounted for a 4% impairment. He apportioned the impairment equally to “pre-existing active” and “pre-existing dormant” arthritis in the left wrist and at the base of the thumb. He stated that the dormant portion was aroused into disability by the claimant’s 24 years of work. Dr. Zerga found no significant evidence of carpal tunnel syndrome on the right. He attributed all of the claimant’s right hand complaints to a non-work-related injury in her youth that had progressed over time, causing arthritis and a painful thumb condition.¹

The claimant’s application for benefits alleged work-related cumulative trauma injuries as of March 12, 1994, in the form of “bilateral carpal tunnel syndrome; upper extremity problems including CMC; thumb joint arthritis, shoulder pain and cervical spondylolisthesis.” When the claim was heard, the cause of the left carpal tunnel syndrome was undisputed. In her brief to the ALJ, the claimant argued that her other “upper extremity conditions,” including carpal tunnel syndrome and thumb joint arthritis in her right hand, were due to her many years of repetitive work. She requested

¹ The claimant testified that her right middle finger was cut and part of her index finger was amputated in an accident that occurred during her youth. Although she had undergone several surgeries on her fingers, she had required no treatment since she was 17 years old.

permanent, partial disability benefits due to “upper extremity overuse syndrome” and a reimbursement for mileage expenses incurred when obtaining treatment from Dr. Einbecker. At the hearing, she testified that it was forty miles from her house to his office and submitted a list of visits from May 3, 1994, through January 2, 1995.

The employer’s brief noted the stipulation that the left carpal tunnel syndrome was work-related. It contested “the work-relatedness of the [claimant’s] claimed right hand arthritis, shoulder problems and neck complaints.” Furthermore, it asserted that no physician had related the claimant’s right carpal tunnel syndrome to her work.

The Opinion and Award of July 10, 1997, noted the parties’ stipulation to work-related left carpal tunnel syndrome. After reviewing the medical evidence, the ALJ stated, in pertinent part, as follows:

The first issue to be addressed by the [ALJ] is the work-relatedness of the Plaintiff’s right hand, arthritis, shoulder, and neck conditions. Dr. Einbecker found that the Plaintiff’s problems in her right arm were caused in part by the Plaintiff’s work activities. He does not, however, discuss the Plaintiff’s shoulder and neck conditions. Dr. Zerga specifically found that these conditions were not due to the Plaintiff’s work. Dr. Zerga’s opinions regarding the neck and shoulder conditions are apparently un rebutted. Based on this evidence, the Court finds that the Plaintiff’s problems with her right and left arms are found to be work-related, while the Plaintiff’s neck and shoulder conditions are found to not be work-related.

The ALJ dismissed the claim for permanent income benefits on the ground that the claimant had failed to show an injury of appreciable proportion. Although the ALJ determined that the claimant’s treatment with Dr. Einbecker had been for her work-related conditions and awarded a mileage reimbursement, the award made no reference to future medical expenses.

In a petition for reconsideration, the claimant noted the parties’ stipulation to a work-related left wrist injury (carpal tunnel syndrome) and the ALJ’s finding that both the

left and right "arm" injuries were work-related. Also noting that KRS 342.020(1) required the employer to pay for reasonable medical treatment of injuries that were found to be work-related, the claimant requested a clarification of her entitlement to such medical expenses. She suggested that page 9 of the Opinion and Award be amended to add the following language:

The Plaintiff, Judy Smith, shall recover of the Defendant-Employer and/or its insurance carrier, such medical, surgical, and hospital expenses as may reasonably be required for the treatment of her occupational injury, including her carpal tunnel conditions, and CMC joint arthrosis.

Responding to the motion, the employer asserted that there was no proof of work-related right-sided carpal tunnel syndrome. On that basis, it maintained that the request for a finding that medical expenses related to right-sided carpal tunnel syndrome were compensable should be overruled. The order of August 8, 1997, rejected the employer's assertion but also failed to list the specific conditions that were compensable as the claimant had requested. It stated, in pertinent part, as follows:

[T]he Plaintiff's petition for reconsideration is SUSTAINED to the extent that the Plaintiff's problems with both her right and left arms were previously found to be work-related and therefore any medical expenses associated with those work-related conditions shall be compensable pursuant to KRS 342.020.

Although the claimant's condition continued to worsen after she received the award, she continued working for the defendant-employer until May, 2001, when she underwent surgery on the right wrist and thumb. The employer reinstated voluntary temporary total disability benefits and also paid medical benefits. On July 9, 2001, the claimant moved to reopen her claim but requested that the matter be held in abeyance until after she recovered from surgery that was planned on the left thumb. Her motion was granted, and the claim was held in abeyance until September, 2002. In the

reopening proceeding, the claimant testified that the problems in her right wrist had resolved following surgery but that the problems in her thumbs had not.

Dr. Einbecker continued treating the claimant after her 1997 award. He performed the subsequent surgeries. Dr. Einbecker noted that the repetitive activities required in her 32 years' employment were stressful to her hands, wrists, and arms. In his opinion, the conditions he had treated were due to her work, particularly the carpal tunnel syndrome. When deposed, he explained that there was an element of aging in CMC joint arthritis and that the CMC joint can be a problem for many women. Although the condition was degenerative and was likely to be pre-existing for a woman of the claimant's age, he thought that it was "certainly aggravated by the work activities if not accelerated." He assigned a 16% impairment for bilateral thumb arthritis.

Dr. Burgess evaluated the claimant. He noted that the carpal tunnel releases had been successful. In contrast, the thumb surgeries had improved function but failed to restore it entirely. Although he thought that the carpal tunnel syndrome was work-related, he characterized the degenerative arthritis in the claimant's thumbs as being "an age-related abnormality and not related to her work activities." Like Dr. Einbecker, he assigned a 16% whole-person impairment to the thumb conditions.

After reviewing the evidence, the ALJ attempted to interpret the 1997 award to determine precisely what upper extremity problems had been found to be work-related. The award noted the parties' stipulation that the left carpal tunnel syndrome that became manifest on March 12, 1994, was work-related. It listed work-relatedness of the "right hand, arthritis, shoulder, and neck conditions" as being contested. It clearly found the neck and shoulder conditions not to be work-related, stated that the "problems with both arms" were work-related, but failed to specify whether those arm problems

included the thumb joint arthritis as well as carpal tunnel syndrome. The ALJ concluded that the carpal tunnel syndrome, which had been diagnosed in both of the claimant's forearms, had been found to be work-related. The ALJ explained that the order on reconsideration did not adopt the language referring to thumb joint arthrosis that the claimant had offered in her petition for reconsideration. Like the award, it referred only to problems with her "arms." Noting that carpal tunnel syndrome occurs in the wrists and forearms, the ALJ concluded that the failure to adopt the proffered language and the continued use of the term "arms" signified that the term referred only to the carpal tunnel syndrome. The work-relatedness of the thumb joint arthritis was not decided.

Turning to the evidence, the ALJ noted Dr. Einbecker's and Dr. Burgess's testimony that thumb joint arthritis was common in women of the claimant's age. The ALJ acknowledged Dr. Einbecker's testimony that the condition was aggravated by the claimant's work but pointed out that a condition was not necessarily work-related simply because it was aggravated by work. Relying on Dr. Burgess, the ALJ determined that the claimant's thumb joint arthritis was not work-related, that her impairment due to carpal tunnel syndrome had not increased, and that the reopening must be dismissed.

The claimant relies on the doctrine of the finality of judgments, also known as the doctrine of res judicata, for the principle that once the rights of the parties have been finally decided, litigation should end. It applies where there is an identity of parties and causes of action, and the previous action decided the matter presently at issue on the merits. See Slone v. R & S Mining, Inc., 74 S.W.3d 259 (Ky. 2002). The application of the doctrine to workers' compensation decisions is based on the principle that because there is an extensive procedure for taking appeals, a final decision should not be

disturbed absent fraud, mistake, or other very persuasive reason that would warrant reopening. Id. at 261.

The parties in the present case are identical to those in the 1997 proceeding, and the claimant raised and litigated the compensability of the arthritic thumb condition in that proceeding. She asserted that it was partially disabling, but there was no evidence of an impairment or a disputed medical expense at that point. She notes that the decision contained no finding that the thumb condition was not compensable. She argues that although it contained no explicit finding regarding the cause of the condition, the parties understood it to mean that the condition was compensable. Hence, the employer paid for the surgeries on her thumbs. She asserts that any ambiguity in the decision should be construed in her favor.

The claimant has cited no authority for the proposition that an employer's failure to contest a medical expense under KRS 342.020 amounts to an admission that the underlying condition is work-related. As the Board and the Court of Appeals noted, it was the claimant's burden in the initial proceeding to show that her thumb joint arthritis was work-related. The 1997 opinion and award failed to address specifically the cause of her right carpal tunnel syndrome and arthritis although the decision listed both conditions as being matters to be considered. The order on reconsideration sustained her petition "to the extent that the [claimant's] problems with both her right and left arms were previously found to be work-related," rendering medical expenses for those conditions compensable. However, the order failed to respond to her request for a more specific finding regarding the arthritic condition, implying a rejection of her claim for the condition or perhaps the perceived lack of a need to be more specific because both the carpal tunnel and thumb were included within the term "arms." Perhaps the

failure to make more specific findings was only an oversight. In any event, because the arthritic condition was a subject of the initial claim, the ALJ who considered the reopening should have concluded that the award and the order on rehearing were intended to include all conditions not specifically excluded or denied.

It is not unreasonable to conclude, and we do, that ALJ Smith would have undoubtedly overruled the claimant's Petition for Reconsideration as it related to medical expenses had he intended in his Award for the thumbs to be excluded. Instead, the ALJ sustained the Petition and restated the fact that the "arms" were previously found to be work related. This order on the claimant's Petition for Reconsideration once again reveals that ALJ Smith used the term "arms" to refer to both carpal tunnel syndrome and the CMC thumb joint arthritis. Because ALJ Smith found the claimant's thumbs and carpal tunnel syndrome to be the work-related condition in 1997, this issue was improperly readdressed by ALJ Steen when this workers' compensation claim was reopened in 2001. The thumbs are part of the hand, the hand is part of the forearm and the forearm is part of the arm. In our opinion, there is no other way to read the ALJ's previous reference to "arms."

Where there is an identity of parties and causes of action, and the previous action decided the matter presently at issues on the merits, the matter should end. See Slone v. R & S Mining, Inc., 74 S.W.3d 259 (Ky. 2002). The application of the doctrine of workers' compensation decisions is based on the principle that because there is an extensive procedure for taking appeals, a final decision should not be disturbed absent fraud, mistake, or other persuasive reason that would warrant reopening. Id. at 261.

The parties in the present case are identical to those in the 1997 proceeding, and the claimant raised and litigated the compensability of the arthritic thumb condition in

that proceeding. Why else would the compensation carrier have continued to pay for treatment and surgery, unless it also believed the matter had been decided. The answer is simply res judicata.

For these reasons, we reverse the decision of the Court of Appeals and remand the matter to the ALJ for further proceedings.

Lambert, C.J.; Graves, Scott, and Wintersheimer, JJ., concur, Cooper, J., dissents by separate opinion with Johnstone and Roach, JJ., joining that dissent.

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DISSENTING OPINION BY JUSTICE COOPER

Appellant, Judy Smith, filed her application for adjustment of claim on December 10, 1996, claiming cumulative trauma injuries to her neck, shoulders, wrists, and thumbs due to repetitive work activities. She had undergone successful surgery for left carpal tunnel syndrome and was anticipating surgery for right carpal tunnel syndrome. Administrative Law Judge (ALJ) Donald G. Smith issued an opinion and award, as amended by order on petition for rehearing, that awarded no disability benefits, but did award medical benefits for "problems with both her right and left arms." There was no appeal. On July 11, 2001, Appellant filed a petition to reopen under KRS 342.125, seeking medical expenses and disability benefits following surgery on her right thumb and anticipating surgery on her left thumb to relieve pain related to carpometacarpal

(CMC) joint arthritis. ALJ Irene Steen issued an opinion dismissing the petition to reopen. The Workers' Compensation Board unanimously affirmed the dismissal, and the Court of Appeals unanimously affirmed the opinion of the Board. The majority of this Court now reverses both ALJs, the Board, and the Court of Appeals by substituting its own findings of fact for those of ALJs Smith and Steen. For that reason, I dissent.

The standard of review when a workers' compensation claimant loses at the ALJ level is whether the evidence presented compelled a different result than that reached by the ALJ.

If the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made.

Thus, we have simply defined the term "clearly erroneous" in cases where the finding is against the person with the burden of proof. We hold that a finding which can reasonably be made is, perforce, not clearly erroneous. A finding which is unreasonable under the evidence presented is "clearly erroneous" and, perforce, would "compel" a different finding.

Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). "Compelling evidence is evidence so overwhelming that no reasonable person could reach the conclusion of the ALJ." Neace v. Adena Processing, 7 S.W.3d 382, 385 (Ky. App. 1999) (internal citation and quotation omitted). When there is conflicting evidence, it cannot be said that there is compelling evidence. Cf. City of Bowling Green v. Hunt, 516 S.W.2d 647, 648 (Ky. 1974) ("In view of the contradictory relevant evidence, it is our view that in this case a reviewing court cannot properly say that the evidence for the appellees was so conclusive and compelling . . . that the decision of the legislative body can be declared arbitrary."). Where the evidence conflicts, the issue essentially becomes a choice of whom and what to believe, and the authority "to determine the quality, character and

substance of the evidence" rests solely with the ALJ. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418, 419 (Ky. 1985). The same principle applies with respect to conflicting medical evidence. Square D Co. v. Tipton, 862 S.W.2d 308, 309 (Ky. 1993); Pruitt v. Bugg Bros., 547 S.W.2d 123, 124 (Ky. 1977).

At the initial hearing before ALJ Smith, most of the testimony centered around Appellant's claims of bilateral carpal tunnel syndrome and neck and shoulder pain. The CMC joint arthritis was diagnosed as a preexisting condition unrelated to the carpal tunnel syndrome. Dr. Einbecker testified that this preexisting condition was "aroused" by Appellant's work activities, whereas Dr. Zerga testified that the only condition related to Appellant's work was her left carpal tunnel syndrome and that all of the problems in her right hand were related to a childhood accident in which the knuckle of her right middle finger was crushed and her right index finger partially amputated. He also testified that the neck and shoulder pain was not work related. ALJ Smith found that "the Plaintiff's problems with her right and left arms" were work related and that her neck and shoulder problems were not work related. He made no specific finding with respect to the CMC joint arthritis. He also found that Appellant had not suffered an injury of appreciable proportions but ordered that Appellant be reimbursed for her travel expenses to and from Dr. Einbecker's office.

Appellant filed a petition for reconsideration, specifically requesting ALJ Smith "to amend Page 9 of the Opinion and Award to add the following language as Paragraph 3 of the Award:

'The Plaintiff, Judy Smith, shall recover of the Defendant-Employer and/or its insurance carrier, such medical, surgical, and hospital expenses as may reasonably be required for the treatment of her occupational injury, including her carpal tunnel conditions, and CMC joint arthrosis [sic].'"

(Emphasis added.) Instead, on August 8, 1997, ALJ Smith entered the following order:

IT IS HEREBY ORDERED AND ADJUDGED that the Plaintiff's petition for reconsideration is SUSTAINED to the extent that the Plaintiff's problems with both her right and left arms were previously found to be work-related and therefore any medical expenses associated with those work-related conditions shall be compensable pursuant to KRS 342.020.

Thus, ALJ Smith did not sustain the petition for reconsideration in its entirety, but only "to the extent that" it pertained to Appellant's problems with her "arms." As ALJ Steen subsequently found, carpal tunnel syndrome typically causes pain in the wrist and forearm, not in the thumb. Thus, a reasonable interpretation of ALJ Smith's refusal to award medical expenses for treatment of the CMC joint arthritis is that ALJ Smith found the CMC joint arthritis not to be work related.

ALJ Steen, however, gave Appellant the benefit of the doubt by finding that ALJ Smith had never made a specific finding as to whether the CMC joint arthritis was work related and undertook to make that determination, herself. The medical evidence presented at the reopening hearing was also conflicting. Dr. Einbecker again testified that Appellant's preexisting CMC joint arthritis was aggravated by her work. Dr. Burgess, however, testified that CMC joint arthritis is common in women 40 to 50 years old and that a natural progression of arthritis was a natural result and was not activity-related. Specifically, he testified that the surgeries performed on Appellant's thumbs were necessitated solely by the natural progression of the arthritis and "not at all related to any work activity." Based on this evidence, ALJ Steen found that "Plaintiff's thumb problems are not work related, but that her pre-existing symptoms were merely aggravated by her work activities and that they are at this time not compensable." Ky. Dep't of Workers Claims, Claim No. 94-17471, Opinion & Dismissal 14 (April 8, 2003) (emphasis added).

The Workers' Compensation Board affirmed, emphasizing ALJ Smith's rejection of Appellant's request to specifically find that the CMC joint arthritis was compensable:

Since the burden before ALJ Smith to establish compensability rested with [Appellant], we can only conclude that by rejecting [Appellant's] offer to more specifically state the conditions for which compensability was found, that only those conditions to which there was no question, carpal tunnel syndrome, could have been found compensable.

Ky. Workers' Comp. Bd., Claim No. 94-17471, Opinion Affirming 9-10 (August 20, 2003). The Court of Appeals agreed.

While the issue of the compensability of [Appellant's] thumb conditions was clearly before ALJ Smith in the original proceeding, his ambiguous reference to "the problems in [Appellant's] arms" could be interpreted to include the thumb condition as well as the carpal tunnel in [Appellant's] wrists. However, we agree with ALJ Steen and the Board that this ambiguity was pointed out to ALJ Smith in the original proceeding. ALJ Smith specifically rejected [Appellant's] proposed language finding that the thumb conditions to be [sic] compensable. By failing to address the compensability of the thumb conditions, it appears that ALJ Smith implicitly rejected the claim.

No. 2003-CA-001982-WC, slip op. at 8 (Ky. App. Feb. 27, 2004).

Now, the majority of this Court rejects both ALJ Smith's implicit finding of noncompensability and ALJ Steen's explicit finding of noncompensability and concludes that, under the principle of res judicata, ALJ Steen had no authority to make her finding because ALJ Smith had already found that the thumb injuries were work related and, thus, compensable. The majority's only support for this erroneous conclusion is its own erroneous finding that "[t]he thumbs are part of the hand, the hand is part of the forearm and the forearm is part of the arm." Ante, at ____ (slip op. at 9). Pursuing that kind of "hip-bone-connected-to-the-thigh-bone" reasoning, one could just as easily conclude that the thumb pain was part of the shoulder injury (which is, in fact, a part of the arm) which ALJ Smith specifically found not to be work related. Of course, while the thumb is a part of the hand, it is not a part of the forearm. See Henry Gray, Gray's Anatomy of

the Human Body §§ II.6.a, II.6.b (Warren H. Lewis, ed., Bartleby.com 20th ed. rev. 2000), at <http://www.bartleby.com/107>. Section II.6.a of Gray's identifies the following as "bones of the upper extremity," i.e., the arm: clavicle, scapula, humerus, ulna, and radius (the latter two comprise the forearm). Section II.6.b lists the following as "bones of the hand": carpus, metacarpus, and phalanges (the thumb is a phalange). Thus, the majority opinion's finding of fact that ALJ Smith found the CMC joint arthritis to be compensable, is not only unsupported by compelling evidence, it is anatomically incorrect.

Accordingly, I dissent.

Johnstone, and Roach, JJ., join this dissenting opinion.