

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***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: APRIL 20, 2006  
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-0565-WC

DATE 5-11-06 E.L.A. Greenleaf P.C.

PATRICIA A. TILLMON

APPELLANT

APPEAL FROM COURT OF APPEALS

2005-CA-0141-WC

V.

WORKERS' COMPENSATION NO. 02-02167 & 01-01602

GENERAL MOTORS CORPORATION; HON.  
MARCEL SMITH, ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

The Workers' Compensation Board (Board) and the Court of Appeals have affirmed an Administrative Law Judge's (ALJ's) decision to dismiss the claimant's application for benefits. She appeals, pro se, asserting that she sustained work-related injuries to her back and left upper extremity after settling a previous claim and also that she is totally disabled. Having concluded that the evidence did not compel a favorable decision, we affirm. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

The claimant began working for the defendant-employer in 1984 and performed a number of jobs on its assembly line. She testified that she began to experience pain in her right wrist in 1994 and that Dr. Schooley performed right carpal tunnel surgery in April, 1995. He continued to treat her thereafter. She stated that she underwent a fusion at C5-6 on the right side in November, 1995. Her subsequent applications for

benefits indicated that she filed a claim for the 1995 neck and right upper extremity injuries.

In April, 2000, Dr. Schooley performed surgery for a right ulnar neuropathy. The claimant testified that in March, 2001, a knot came up on her left wrist. It was diagnosed as a cyst. She also experienced a tingling sensation in her "baby finger" and the adjacent finger. In November, 2001, Dr. Wolff performed cubital tunnel surgery as well as surgery on the cyst.

On November 30, 2001, the claimant filed an application for benefits in which she alleged repetitive motion injuries to her neck and both upper extremities. She later testified that she returned to work in March, 2002, and described her work as involving repetitive hand and arm motions. In support of the claim, she submitted evidence from Dr. Wolff, who assigned an 11% impairment based on the left upper extremity. Dr. Schooley assigned a 15% impairment due to the cervical condition. On July 31, 2002, the parties agreed to settle the claim for a 13% disability. At the time, the claimant was represented by counsel.

In October, 2002, the claimant quit working and Dr. Wolff performed surgery on her left elbow and wrist. Assisted by different counsel than in her previous claim, she filed another application for benefits in December, 2002. The application listed the 1995 and 2001 claims and alleged August 9, 2002, repetitive motion injuries to her left hand, wrist, arm, and shoulder. She did not move to reopen her 2001 claim.

The claimant continued to see Dr. Schooley. Although his notes had referred to periodic complaints of back pain since 1996, the first such reference after August 9, 2002, occurred in December, 2002. He later testified that a CT scan performed in February, 2003, revealed essentially the same changes that were evident in 1996.

Nonetheless, in August, 2003, the claimant moved to amend her pending claim to include a work-related back injury that also occurred on or about August 9, 2002. A discogram performed on September 3, 2003, revealed abnormalities for which Dr. Schooley recommended surgery. He testified subsequently that the claimant first related the back condition to her work several days later, on September 9, 2003. She underwent a lumbar fusion in October, 2003.

During litigation of the 2002 claim, Dr. Schooley testified that until the claimant informed him of a work-related injury, he thought the x-ray findings and degenerative disc disease in her spine were due to the natural aging process. However, based on the history of repeated bending and lifting at work and the lack of evidence of other trauma, he stated that the back condition was also consistent with a work-related injury.

Dr. Sheridan was not convinced that the claimant's back condition was work-related based on her failure to relate it to her work until September, 2003. Nor was he convinced that the condition was any different in 2002 than it had been two years before she filed her claim. He thought that she could work if restricted to lifting no more than 10 pounds.

Among the contested issues in the 2002 claim were whether the claimant sustained a work-related back injury and a new injury to her left upper extremity on August 9, 2002, and whether the alleged injuries were disabling. The 2001 and 2002 claims were consolidated for the purpose of comparing the evidence. However, the claimant did not allege a worsening of her previous left upper extremity injury or move to reopen the 2001 claim under KRS 342.125(1).

After reviewing voluminous medical records, the ALJ rendered the following findings of fact and conclusions of law:

In determining the extent and duration of the plaintiff's occupational disability, I am more persuaded, with regard to the left hand, wrist, arm and shoulder complaints, by the opinions of Dr. Wolff. Dr. Wolff has had the opportunity to see plaintiff numerous times over an extended period. He was her treating physician. His opinions are well supported by objective medical findings. Dr. Wolff's impairment and restrictions are the same as they were immediately prior to plaintiff's settlement in [the 2001 claim]. Being persuaded by Dr. Wolff, I find that plaintiff suffers no occupational disability due to any left hand, wrist, arm or shoulder complaints caused by an injury of August 9, 2002.

With regard to plaintiff's back complaints, I am more persuaded by the opinion of Dr. Schooley. Dr. Schooley is plaintiff's treating physician. Beginning on August 14, 1996, plaintiff saw Dr. Schooley for her back condition. This was not a dormant condition. It was active in 1996. Plaintiff complained at that time that it left her unable to walk. Being persuaded by Dr. Wolff [sic], I find that plaintiff suffers no occupational disability due to any back complaints caused by an injury of August 9, 2002.

The ALJ then dismissed the claim.

Treating the claimant's subsequent pro-se "Petition for an Appeal" as a petition for reconsideration, the ALJ overruled it on the ground that she failed to serve it on any other party. The Board then treated the same document as a brief on appeal. After summarizing the evidence and considering each of the claimant's arguments, the Board affirmed. Finding no error, the Court of Appeals affirmed the Board.

The claimant had the burden to prove every element of the 2002 claim, including that she sustained and was disabled by a new repetitive motion injury to her left upper extremity and a work-related back injury, both of which occurred on August 9, 2002. KRS 342.285 designates the ALJ as the fact-finder in workers' compensation claims and prohibits a re-weighing of the evidence on appeal. Therefore, an ALJ's finding against the party with the burden of proof

may be reversed only when the favorable evidence is so overwhelming that it renders the ALJ's decision unreasonable. Special Fund v. Francis, supra; REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

It is apparent that the ALJ made only a typographical error when referring to Dr. Wolff in the final sentence of the final paragraph rather than Dr. Schooley. When summarizing Dr. Schooley's testimony regarding the alleged back injury, the ALJ noted that, in 1996, the claimant complained of back pain that was so severe she sometimes had trouble walking. It is immaterial in the present situation whether the ALJ's analysis of the evidence referred to active impairment or active disability because it is clear the ALJ was not persuaded that the claimant's symptoms were due to a work-related back injury of August 9, 2002. Moreover, the evidence was not so overwhelming as to compel a favorable finding.

The claimant settled her 2001 left upper extremity claim on July 31, 2002. As evidence of an August 9, 2002 injury to her left upper extremity, the claimant points out that Dr. Wolff performed surgery to her left elbow and wrist in October, 2002. The fact remains, however, that the impairment and restrictions he assigned following the surgery were the same as they had been when the 2001 claim was settled. Under the circumstances, the evidence did not compel the ALJ to determine that the claimant sustained or was disabled by an August 9, 2002, left upper extremity injury.

The standards by which the federal government awards social security disability benefits differ from those found in Chapter 342. Although the claimant's receipt of a social security disability award may be viewed as being

some evidence she was totally disabled on that date, it would not have compelled a finding of total disability under KRS 342.0011(11)(c). Moreover, absent a properly supported finding that the claimant sustained and was disabled by either or both of the alleged injuries of August 9, 2002, questions regarding total occupational disability are moot.

The decision of the Court of Appeals is affirmed.

All concur.

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