

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: JUNE 15, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2006-SC-0011-WC

DATE 7-6-06 E.A. Groun

HENRY A. DONATHAN

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-1376-WC
WORKERS' COMPENSATION NO. 01-72851

QUALITY CABINETS; J. LANDON
OVERFIELD, ALJ; AND WORKERS'
COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) dismissed the claimant's application for benefits after determining that he failed to sustain his burden of proving a work-related injury and failed to give due and timely notice of such an injury. The Workers' Compensation Board and the Court of Appeals affirmed. Appealing, the claimant asserts that the substantial evidence of record compelled favorable findings on both issues. We affirm.

The claimant was born in 1959 and completed high school but had no specialized or vocational training. He worked for a manufacturer of kitchen cabinets. On May 6, 2002, he filed an application for benefits. It alleged that he injured his right shoulder on June 1, 2000, while pounding frames in place with a hammer and gave oral notice on that date. On June 26, 2001, he quit working to have shoulder surgery, and

did not return thereafter. Among other things, the employer denied receiving due and timely notice, denied that the alleged accident occurred, and denied that the right shoulder injury was work-related. Therefore, the ALJ bifurcated the claim to consider those issues and placed the remaining issues in abeyance.

When deposed in June, 2004, the claimant had undergone numerous surgeries on his right shoulder since June, 2001. He testified that he worked as a clamp operator and described his duties as involving "a lot of pounding on frames with a hammer," using his right hand. He explained that he clamped glued sections of a cabinet together and then stapled the frames together with a staple gun. He stated that he had to use a hammer "to beat and bang them in place to engage them" and suffered an onset of shoulder pain while working. The claimant conceded that he was also being treated for left shoulder problems but testified that he was not claiming those problems were work-related.

The claimant stated that sometime in June, 2000, he informed Penny Mills (his supervisor) that his right shoulder was hurting and told her that he thought the pain was due to all the pounding on mortises that were too tight. He stated that Ms. Mills referred him to the human resources manager, Cathy Charles, and that he repeated what he had told Ms. Mills. When Ms. Charles did not get back to him as she said she would do, he went to his own doctor on September 14, 2000. Sometime after June, 2000, he moved to a different job building frames. Asked why he did so, he responded that it was "because my shoulders hurt all the time." Asked when he did so, he responded that it was on "the day I got hurt." Asked to specify the date, he responded "June of 2000."

The claimant testified that he continued working and moved from building frames

to clamping them when his shoulder was not hurting too badly. He requested and received 90 days' leave under the Family and Medical Leave Act beginning on June 27, 2001, at which time he underwent shoulder surgery. He also applied for and received short-term disability benefits. After they expired, he received some long-term disability benefits. The claimant stated that he saw Ms. Charles in September, 2001, and told her that a physician had informed him his shoulder condition was work-related. Asked why his physicians' treatment notes did not relate the cause of the condition to his work until June, 2001, he insisted that he had always told them he had shoulder pain from pounding on frames.

Under direct examination by his counsel, the claimant testified that 50-60% of a workday he raised his arm above his shoulder while hammering and using a staple gun. He stated that on the day he reported an injury to Ms. Mills, his right shoulder became very painful, and he could not finish work.

The earliest medical records in evidence were from Dr. McGinnis and dated September 14, 2000. They indicated that the claimant complained of shoulder pain, particularly on the right side. They also indicated that he complained of leg pain, dizziness, and low energy, but the claimant later denied giving those complaints. Although he maintained that he told Dr. McGinnis the shoulder condition was work-related, neither the records from September 14, 2000, nor those from subsequent visits indicated that it was due to the claimant's work.

The claimant first saw Dr. Chattha, an orthopedic surgeon, on April 10, 2001. He complained of right shoulder pain for about a year but denied any specific injury. He indicated that it bothered him with overhead activity and at night. The claimant stated that he worked installing cabinets and that it involved a fair amount of overhead work.

X-rays revealed no evidence of bony pathology or AC joint arthritis. A May, 2001, MRI revealed evidence of impingement and rotator cuff inflammation but no tear; however, the radiologist noted the possibility of a labral tear. The operative record from the June 27, 2001, arthroscopic procedure revealed bursitis but good articular surfaces, no labral tear, and normal biceps and scapularis tendons. Notes from the numerous visits before the claimant's shoulder surgery do not mention a specific work-related injury, mention pounding on frames with a hammer, or relate the claimant's shoulder pain to that activity. Nonetheless, the operative record states that the shoulder pain "is related to a work injury."

Penny Mills confirmed that the claimant worked as a clamp operator, which involved putting frames into a clamp, adjusting it, and then putting gauges into the frames and adjusting them with a rubber mallet. The frames generally weighed five pounds, but special frames could weigh 10 or 15 pounds. The job required repetitive overhead work 70% of the day. In June, 2000, the claimant told her that his shoulder was hurting, and she moved him to frame building, a different position that was part of the same job. She was adamant that he never told her that his shoulder problems were due to an on-the-job injury or his duties. Had he done so, she would have informed human resources and prepared an accident report. She stated that he requested a move to frame building, indicating that it did not hurt his shoulder and also that he wanted to build frames so that he could help his son learn the clamp operator position. Ms. Mills testified that the claimant did not complain of shoulder pain after June, 2000, and missed no work due to shoulder problems until he took leave for surgery.

On cross-examination, she stated that the claimant would have worked about a half hour to an hour per day on tall frames, about half of which weighed 10 to 15

pounds. She stated that frame clamp operators used a rubber mallet to adjust the frames. Asked whether they were required to pound on frames and hammer them, Ms. Mills responded, "You have to tap the frames." She stated that she reported the claimant's June, 2000, complaints to Ms. Charles, who met with the claimant. She acknowledged that an employee experiencing work-related pain would be given duties that did not aggravate the pain when possible but that a non-work-related condition would not be accommodated in that manner. Asked why the claimant was allowed to change duties if his shoulder condition was not work-related, she responded that the employer had new clamp operators and was attempting to train them. She acknowledged that the frame building position had a lower classification than the frame clamp operating position. She stated that after the claimant was moved to the build position, he did not ask to return to clamp operation. Nor did she ask him to do so.

Cathy Charles, the human resource manager, testified that the claimant did not inform her that his shoulder problems were caused by his work until the fall of 2001. She did not know that the claimant continued to have shoulder problems after June, 2000, until he requested family medical leave in June, 2001. Ms. Charles introduced the claimant's June 25, 2001, leave request and the certification from Dr. Chattha, neither of which indicated that the shoulder condition was work-related. Moreover, Dr. Chattha indicated that the condition had been present since April, 2000.

Ms. Charles also introduced into evidence the claimant's July 5, 2001, application for short-term disability benefits. Asked to indicate if the claim was due to an injury, the claimant responded, "No." He failed to respond to questions asking if the claim was related to his occupation and if he intended to file a workers' compensation claim. Likewise, Dr. Chattha failed to respond to a question asking if the condition was

due to an injury or sickness arising out of the patient's employment.

Finally, Ms. Charles introduced the first report of injury, stating that it was based on the claimant's statements to her in September, 2001, when he first indicated that his shoulder problems were caused by his work. It indicated that the claimant first notified the employer of a work-related shoulder injury on September 28, 2001; listed the date of disability as June 25, 2001; and listed the date of injury as "unknown – alleges summer of 2000."

Drs. Goldman and Gladenstein performed IME exams for the parties and were deposed; however, the ALJ did not refer to their testimony. After reviewing the other evidence, the ALJ noted the discrepancy between the claimant's version of events and that of Ms. Mills and Ms. Charles and also noted that the claim appeared to have morphed into one for a gradual injury. The ALJ noted the claimant's assertion that Ms. Mills admitted that his duties would not have changed had his shoulder condition not been work-related but also noted the documentary evidence that supported Ms. Mills' and Ms. Charles' testimony. Observing that the medical evidence supporting the claim was based on a history the claimant related, the ALJ pointed out that the worker's credibility is paramount when the defendant denies that the alleged injury occurred. Not convinced that the claimant was being truthful, the ALJ determined that he failed to sustain his burden of proving that he sustained a work-related injury.

The claimant has maintained on appeal that substantial evidence of record compels a different result. He argues that the ALJ failed to consider evidence of a work-related injury including: testimony by Ms. Mills that his job required repetitive overhead work 70% of the day; that she moved him to a different position immediately after he reported pain while working; that she reported the incident to Ms. Charles as

she testified she would do after an on-the-job injury; and that there was no evidence of another cause of his pain. He also argues that he gave notice of a work-related injury on two occasions. First, he gave notice of shoulder pain while working in June, 2000, and the employer's subsequent conduct showed that it knew the condition was work-related. Second, he did not receive a definitive diagnosis of a work-related gradual injury until June, 2001. He informed Ms. Charles in September, 2001, and a first report of injury was completed at that time.

An injured worker has the burden to prove every element of a claim for benefits. Roark v. Alva Coal Corporation, 371 S.W.2d 856 (Ky. 1963); Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App.1984); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). KRS 342.285 designates the ALJ as the finder of fact; therefore, the ALJ has the sole discretion to determine the quality, character, and substance of evidence. See Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). In doing so, an ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Faced with conflicting evidence, an ALJ may choose whom and what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). Where the party with the burden of proof fails to sustain that burden, that party's burden on appeal is to show that the favorable evidence was so overwhelming that no reasonable person could have failed to be persuaded by it. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986); Paramount Foods, Inc. v. Burkhardt, supra; Mosley v. Ford Motor Co., 968 S.W. 2d 675 (Ky. App. 1998); REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). A positive finding must be supported by substantial evidence in order to be sustained on appeal. Special

Fund v. Francis, *supra*. However, a negative finding (i.e., one that merely indicates the ALJ is not persuaded by the evidence favoring the party with the burden of proof) need not be. Butcher v. Island Creek Coal, 465 S.W.2d 49 (Ky. 1971).

The claimant's application was filed in May, 2002, long after he received a diagnosis and informed Ms. Charles that his gradual injury was work-related. Nonetheless, the application alleged that he sustained a right shoulder injury due to pounding frames on June 1, 2000. Although he testified that he informed his employer of a work-related injury on that day, the evidence was conflicting regarding precisely what he told his supervisor. Despite the alleged injury, there was no evidence that he sought medical treatment between June 1, 2000, and September 14, 2000, when he saw Dr. McGinnis and complained of pain in his shoulders that was worse on the right side. In April, 2001, he gave Dr. Chattha a history of shoulder pain since April, 2000. Although the claimant conceded subsequently that the left shoulder pain was not work-related, he offered no explanation for why its cause would be different from that of the right shoulder pain. Both his June, 2001, requests for leave and short-term disability benefits and Dr. Chattha's supporting statements indicated that the right shoulder condition was not work-related. Yet, Dr. Chattha's June, 2001, surgical note indicated without explanation that it was. Under such circumstances, it was for the ALJ to judge the credibility of the witnesses and to weigh the conflicting evidence.

The favorable evidence was not so overwhelming as to compel a finding that the claimant notified Ms. Mills on June 1, 2000, of a work-related traumatic event that occurred that day or to compel a finding that his right shoulder condition was due to such an event. Although the claimant points to medical evidence that he sustained a work-related repetitive motion injury, at no time did he move to amend his claim to

allege such an injury. In any event, the favorable evidence was not so overwhelming as to compel findings that he sustained harmful changes to his right shoulder due to work-related cumulative trauma and that he gave notice as soon as practicable after a physician informed him that his work caused the right shoulder condition.

The decision of the Court of Appeals is affirmed.

All concur.

COUNSEL FOR APPELLANT:

Brandie Hall
Patrick & Leighton, PLLC
25 West Main Street
Mt. Sterling, KY 40353

**COUNSEL FOR APPELLEE,
QUALITY CABINETS:**

Judson F. Devlin
Fulton & Devlin
Browenton Place, Suite 165
2000 Warrington Way
Louisville, KY 40222