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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: March 22, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 4-12-07 EnA Grauman DC.

2006-SC-0478-WC

MARTHA COX — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-1912-WC
WORKERS' COMPENSATION NO. 01-00454

TRIM MASTERS, INC.,
HON. HOWARD E. FRASIER, JR.; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In a decision that was affirmed by the Court of Appeals, the Workers' Compensation Board (Board) vacated an Administrative Law Judge's (ALJ's) refusal to award temporary total disability (TTD) benefits during periods that the claimant underwent surgery for the effects of her injury. Although the Board also found erroneous the failure to determine that neuritis resulting from the axillary block used during surgery was work-related, it concluded that the error was harmless. The claimant asserts that the error regarding her neuritis was not harmless and also that the ALJ erred by dismissing of her claims for various other conditions and finding that she was only partially disabled. We affirm.

Born in 1948, the claimant is left-handed and has spent almost her entire work life as a sewing machine operator for Union Underwear. She earned a college degree

in organizational management while working full time. After being laid off in 1997, she earned a paralegal degree. She began working for the defendant-employer, sewing trim covers for automobile seats, in April, 1999. When leaving work on April 23, 1999, she tripped over a speed bump in her employer's parking lot and fell. She later testified that the fall broke her glasses, rendered her unconscious, and injured the right side of her forehead and her right shoulder, neck, forearm, and knee. After undergoing x-rays, she was released to return to work.

Dr. Brooks, the claimant's family physician, began treating her on April 26, 1999. He characterized her injuries as being "significant," placed her on light-duty work, and treated the wrist injury with pain medication and a splint. Although her other injuries resolved over time, her wrist and hand continued to be painful.

The claimant was referred to Dr. Burgess, an orthopedic surgeon. He noted on August 9, 1999, that she was able to perform her regular duty but complained of persistent pain and discomfort on the ulnar aspect of her right wrist. X-rays were normal. On August 18, 1999, he noted that bone and CT scans had revealed a small fragment off the base of the fifth metacarpal that was consistent with a fracture.[1] He prescribed carpometacarpal (CMC) joint injections and oral analgesics and anti-inflammatories. On December 6, 1999, he noted that she continued to have some discomfort in cold weather but that her symptoms had decreased. He noted that she was on regular duty, concluded that her discomfort would gradually end, and advised her to return only as needed.

On December 4, 2000, the claimant returned to Dr. Burgess, stating that her pain remained constant and occasionally went up her arm. Tests performed at Dr. Brooks'

1 Throughout the medical evidence, the terms fifth finger and little finger are used interchangeably.

request revealed normal ulnar nerve function, and Dr. Burgess noted that the changes in median nerve function were unrelated to her pain. On physical exam, he noted that the claimant's pain remained on the ulnar side of her hand but had migrated. She now localized it to the ulnar side of the metacarpophalangeal joint, but x-rays of the joint were normal and range motion was full. She had no complaints of pain at the base of the fifth finger, and stress of the CMC joint was negative. Responding to a January 17, 2001, query from the insurance carrier, he indicated that the claimant's present symptoms were unrelated to the initial injury. Based on his response, the carrier informed the claimant on February 6, 2001, that it would not pay for further medical treatment voluntarily.

Dr. Brooks reported on February 7, 2001, that the claimant had sustained a significant injury to her hand and that her present complaints were consistent with ulnar nerve neuropathy. She had no signs of median nerve neuropathy. In his opinion, some permanent discomfort was likely. His records contained a March 20, 2001, report from Miller Physical Therapy indicating that the claimant's whole-body impairment was 12%. The report noted her statement that her hand was no better than when she was injured but indicated that both her history and physical examination were "questionable," that her symptoms were inconsistent, and that she gave a submaximal effort during testing.

When deposed on June 8, 2001, the claimant worked 40 hours per week and some overtime. Her employer provided lighter work than before her injury, and co-workers helped her when necessary. Her sole complaint was of pain at the base of her small finger and some swelling in the morning.

On June 12, 2001, Dr. Burgess reported that the claimant's permanent impairment rating was 0% and that her present symptoms were unrelated to the

accident at work. Also on June 12, 2001, Dr. Sheridan (an orthopedic surgeon) examined her and reviewed the medical records. He diagnosed a healed fracture of the base of the right fifth metacarpal and agreed with Dr. Burgess that her present symptoms and median nerve abnormalities were unrelated to the accident at work. Noting the absence of positive objective findings, he thought that the injury warranted no permanent impairment rating or restrictions. In his opinion, the claimant had the physical capacity to perform her regular job, and he did not think that future medical treatment for the effects of the accident would be reasonable or productive.

In July, 2001, the claimant sought treatment from Dr. Kleinert, who ordered hand x-rays, diagnosed traumatic arthritis in the right fifth metacarpal joint, and recommended surgery. He performed an unsuccessful arthrodesis (fusion) and bone graft in August, 2001, and a successful repeat procedure in April, 2002. Both were performed under an axillary block. The claimant's hand and forearm symptoms continued despite the surgery, and on January 14, 2002, Dr. Kleinert diagnosed reflex sympathetic dystrophy (RSD). A third surgery to release the right median nerve was performed in June, 2003, under general anesthesia. The underlying conditions were found not to be work-related and are no longer at issue.

In addition to her hand, wrist, and forearm pain, the claimant eventually complained of right ear, neck, and shoulder pain, high blood pressure, and anxiety. She asserted that all were due to her work-related injury. When deposed in June, 2003, days after the third surgery, Dr. Kleinert stated that the initial fracture fused and caused no pain. He stated that her present complaints of hand pain were due to nerve damage resulting from the axillary block used in the surgery but added that it did not cause much of a disability. He stated that her primary impairment would be based on

loss of motion and strength in the hand and would warrant no more than a 5% permanent impairment rating.

Dr. Burgess evaluated the claimant on May 9, 2002. At the time, she remained in a cast after the second surgery. Asked what symptoms she experienced between her last visit in December, 2000, and her initial visit to Dr. Kleinert seven months later, the claimant reported that her symptoms did not change. They included tingling and numbness in the ring and small fingers, intermittent swelling on the ulnar side of her hand, and intermittent pain in her hand that was usually relieved with Tylenol. Noting that he had not been able to elicit symptoms at the CMC joint in December, 2000, but that Dr. Kleinert reported tenderness there in July, 2001, Dr. Burgess stated that it was possible that the claimant's arthritic symptoms had changed in the interim. If so, surgery was reasonable care for arthritic changes at the CMC joint of the fifth finger.

In October, 2003, Dr. Petruska began treating the claimant for right shoulder pain and for pain, numbness, and tingling in the right fourth and fifth fingers on referral from Dr. Kleinert. On March 5, 2004, he completed a Form 107, reporting a diagnosis of right shoulder impingement syndrome, soft tissue injury to the neck and right shoulder, osteoarthritis, chronic peripheral nerve injuries, and cervical degenerative disc disease. He attributed all of the claimant's complaints to her work injury. He assigned a 5-8% permanent impairment rating for the neck, attributing 50% to degenerative disease.

Dr. Muffly evaluated the claimant in June, 2004, at which time she complained of pain with movement in all of the joints of her right upper extremity. She had a full range of motion in the cervical spine with some pain complaints. Dr. Muffly diagnosed a fracture of the proximal fifth metacarpal that was associated with the April, 1999, accident and that had been treated with arthrodesis. Although the claimant complained

of tingling throughout the right upper extremity, there were no signs of sensory abnormality. Two-point discrimination was normal in all digits on the right side. He noted that x-rays revealed a good arthrodesis and that there were no signs of joint or tissue swelling, hand atrophy, or RSD. Dr. Muffly determined that the third surgery and cervical degenerative disc disease were unrelated to the 1999 injury. He assigned a 5% permanent impairment rating to the work-related injury and restricted the claimant to lifting no more than five pounds with the right hand and to using it as an assisted hand.

Mr. Mike Wright, the employer's human resources director, introduced wage reports indicating the times that the claimant missed work after her injury. He acknowledged the carrier's refusal to pay medical expenses after February, 2001, and indicated that the claimant received short-term disability benefits when off work for the surgeries. The company provided work within her medical restrictions until February 17, 2004, when she could no longer perform any available work. Wright explained that Dr. Kleinert had assigned permanent restrictions in January, 2004, that limited her to primarily left-handed work.

The claimant's vocational expert, Dr. Barnes, reported that she was totally occupationally disabled based on her age, physical limitations, earning potential, non-dominant arm limitations, and lack of experience in the fields for which she held degrees. The employer's expert, Dr. Conte, noted that Drs. Burgess and Sheridan assigned no work restrictions and thought that she retained the physical capacity to return to perform her previous work. In contrast, Drs. Kleinert, Muffly, and Petruska restricted her from lifting more than three to five pounds and from constant repetitive motion with her right hand. Although her academic record and computer literacy would enable her to perform skilled and semi-skilled work, their restrictions would limit her to

light and sedentary work, causing a 25% occupational loss.

At the hearing, the claimant testified that she could not lift groceries by herself and could only drive the 300 yards to her mailbox. She had not applied for unemployment benefits because she considered herself to be totally disabled. Her health insurance carrier had paid most of her medical bills.

In a 49-page opinion that reviewed the lay and medical evidence extensively, the ALJ noted that the claimant's testimony varied over time. At the June 8, 2001, deposition, she identified no problem other than pain in her hand and swelling at the base of her little finger. Finding her more recent testimony alleging other injuries not to be credible, the ALJ determined that only the injury to her right hand and wrist was permanent. Moreover, despite her cupped hand behavior, Dr. Kleinert testified that she could extend her fingers normally and make a normal fist. Noting that Drs. Kleinert and Petruska did not see the claimant until long after her injury and also noting that the basis for Dr. Petruska's opinion of causation was the history that the claimant related, the ALJ characterized as "more credible" the testimony of Drs. Muffly, Burgess, and Sheridan. They indicated that the carpal tunnel, neck, and shoulder complaints were not due to the work-related accident.

The ALJ determined that the claimant provided timely notice of the accident and of the injury to her right hand and wrist. However, the employer's records were more persuasive than her testimony that she gave oral notice of the neck and shoulder injuries that she later alleged. The ALJ found the 5% permanent impairment rating that Drs. Muffly and Kleinert assigned for the hand and wrist injury to be persuasive. Convinced that the injury was not totally disabling but that the restrictions imposed by Dr. Muffly precluded the type of work that the claimant performed at the time of injury,

the ALJ determined that the applicable version of KRS 342.730(1)(c)1 and 2 entitled her to an enhanced benefit during periods that she did not work at the same or a greater wage and to ½ the benefit during periods that she did. Based on Dr. Brooks' determination that permanent impairment could be rated as of February 7, 2001; the parties' failure to propose a date for maximum medical improvement (MMI); and the claimant's ability to work at the same or a greater wage except when off for surgical procedures and other medical concerns, the ALJ determined that she failed to prove her entitlement to any temporary total disability (TTD) benefits. Although the claimant received an award of future medical benefits for the hand and wrist injury, the ALJ noted that the parties had yet to provide sufficient information to determine the reasonableness, necessity, and work-relatedness of all of the disputed medical expenses.

The claimant petitioned for reconsideration of the conditions found not to be compensable. She also requested a specific finding that she sustained nerve damage to her right arm due to the axillary block used during the arthrodesis surgeries and that the condition rendered her totally disabled. The employer requested specific findings to clarify the nature of the injury.

The ALJ refused to change the decision but did make some additional findings. The order on reconsideration stated that the work-related injury was a fracture to the right fifth metacarpal and noted that the physicians also referred to it as an injury to the right hand and wrist. It stated that the ALJ was "not persuaded by Dr. Kleinert that the axillary block was reasonable and necessary for her fracture of her right fifth metacarpal in April 1999, or that such procedure resulted in the 'unusual' blocked neuritis." The claimant appealed.

Although the Board affirmed in all other respects, it vacated the ALJ's refusal to award TTD benefits. The Board acknowledged the claimant's failure to raise the patent error in her petition for reconsideration but reasoned that the ALJ's refusal was not supported by substantial evidence because the arthrodesis surgeries were performed for the effects of the claimant's injury and clearly were disabling for periods of time. It also determined that the ALJ erred in finding the axillary block to be neither reasonable nor necessary medical treatment and in failing to find that it caused a compensable neuritis because Dr. Kleinert's testimony regarding the presence of the condition and its cause was uncontroverted. Concluding, however, that the error was harmless, the Board noted that he had included the condition when rating the hand and wrist impairment. The claimant appealed, but the employer did not.

As explained in 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), the burden is on an injured worker to prove every element of a claim, including work-related causation and the extent of disability. Because KRS 342.285 designates the ALJ as the finder of fact, the ALJ has the sole discretion to determine the quality, character, and substance of evidence. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986), explains that if a party with the burden of proof fails to convince the finder of fact, the party must show on appeal that the favorable evidence was so overwhelming as to compel a favorable finding. In other words, it must show that no reasonable person would have failed to be convinced by the evidence.

Although the claimant asserts that the ALJ erred by finding only her hand and wrist injury to be work-related, we are not convinced that the favorable evidence was so

overwhelming as to compel a favorable finding. As the ALJ pointed out, the claimant's testimony concerning the events surrounding the accident in which she was injured changed over time. Dr. Brooks' contemporaneous notes indicate that only the hand and wrist injury failed to resolve. Dr. Kleinert did not see her until more than two years after she was injured, and her complaints of neck and shoulder pain arose until nearly two years after that, in May, 2003. Dr. Petruska saw her even later and based his opinion of causation on a history that she reported. Despite her assertions, the favorable evidence was not so overwhelming as to compel the findings that she seeks.

Contrary to the claimant's assertion, the ALJ did not determine that she failed to give timely notice of the axillary block neuritis. Nor did the Board and the Court of Appeals affirm such a finding. Questions regarding timely notice of her other conditions are moot.

The Board determined that the ALJ erred by failing to determine that the two arthrodesis surgeries were performed for the effects of the claimant's injury, that she was entitled to periods of TTD following the procedures, and that she suffered from neuritis due to the axillary block used in the surgeries. It determined, however, that the last error was harmless. The claimant argues that the error was not harmless because it was the basis for the conclusion that the loss of use of her right arm was not work-related and resulted in a finding that her injury was not totally disabling. We disagree.

The claimant was left-handed. She injured her right hand and wrist. Dr. Kleinert's deposition testimony related the axillary block neuritis to pain in her right hand and wrist and specifically stated that it was "not very disabling." He stated that the impairment from her wrist and hand injury was no more than 5%. The ALJ relied on Dr. Muffly's restrictions regarding the effects of the work-related injury, and they did not

indicate that the claimant lost all use of her right arm. He restricted her to lifting no more than five pounds with the right hand and to using it as an assisted hand. Vocational evidence indicated that she could work within those restrictions. In light of the claimant's intellectual and academic levels (3.7 GPA in college and 4.0 GPA in paralegal training), her articulate testimony, her experience as a payroll clerk, and her computer literacy, the ALJ found that she was capable of sedentary, light-duty work. Mindful that KRS 342.730(1)(a) permits only work-related impairment to be considered when determining whether a worker is totally disabled, we are convinced that the evidence did not compel a different conclusion.

The decision of the Court of Appeals is affirmed.

All concur.

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