

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: APRIL 19, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2006-SC-000558-WC

DATE 5-10-07 ELLAGROVITZ, D.C.

H. K. SYSTEMS, INC.

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-002229-WC
WORKERS' COMPENSATION NO. 04-76231

DANNY WHALEN;
HON. ANDREW MANNO,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant failed to prove that his degenerative back condition was work-related. The Workers' Compensation Board affirmed, but the Court of Appeals vacated and remanded for further consideration, explaining that KRS 342.0011(1) requires medical causation to be proved to a reasonable medical probability but does not require it to be proved with objective medical findings. Because a medical opinion that is based on an incorrect standard for determining causation cannot constitute substantial evidence and because it is unclear that the ALJ applied the correct standard, we affirm.

The claimant was born in 1955 and completed the eighth grade. He worked as a painter on the defendant-employer's production line from December 1, 1975, through

March 10, 2004. His work was physically demanding and fast-paced. There was evidence that a typical paint line moved at the rate of 6-10 feet per minute but that the line on which he worked moved at the rate of 12 feet per minute and had moved as fast as 18 feet per minute. The claimant testified that the job required him to carry 5-gallon buckets of paint that weighed about 90 pounds and to maneuver 55-gallon drums of paint from skids onto a hand truck. It also involved frequent bending, twisting, turning, stooping, and standing. He stated that he and his co-workers commonly had backaches at the end of a strenuous shift.

Medical records indicated that the claimant had been treated for low back pain that extended into his left leg in 1993. In 1999, he had complained of "burning" back pain. In November, 2000, he had complained of back, leg, and foot pain, and in October, 2002, he had complained of back pain.

The claimant testified that his low back pain arose gradually over the years but worsened significantly in January, 2004. He presently experienced what he described as breathtaking stabs of low back and hip pain that shot down his left leg into his toes and also experienced occasional numbness and weakness in the leg. He stated that the pain was constant. Although it was relieved temporarily by reclining with his feet in the air, medical treatment provided inadequate relief. He quit working on March 10, 2004, and filed a claim based on work-related cumulative trauma as of that date. Testimony from two physicians addressed the cause of the claimant's condition.

An October 10, 2004, report from Dr. Kelly indicated that he had treated the claimant for back and left leg pain since April 30, 2004. MRI revealed the presence of degenerative changes in the lumbar spine but no evidence of nerve root compression. Dr. Kelly diagnosed lumbar spondylosis, lumbar disc degeneration due to repetitive

strain injury, and lumbar radiculopathy. He noted that the claimant had performed the same job, with the same repetitive twisting and bending, for 29 years. In his opinion, this caused wear and tear on his lower back that greatly exceeded the normal aging process. A supplemental report indicated that the highly repetitive nature of the claimant's work substantially contributed to the premature development of lumbar degenerative disease. This was consistent with the facet arthropathy and spurring shown on MRI. In his opinion, the claimant's work caused 80% of the condition, and the natural aging process caused the remaining 20%.

Dr. Larkin evaluated the claimant for the employer. His December 13, 2004, report noted that diagnostic testing revealed the presence of degenerative lumbosacral arthrosis but no evidence of a herniated disc. He stated, "As to whether or not this represents a repetitive or cumulative trauma effect, findings are consistent for the normal aging process in a patient of this age." Dr. Larkin noted that neither of the EMG studies revealed evidence of radiculopathy or peripheral neuropathy; that the claimant's radicular complaints could not be replicated on examination by himself, Dr. Melton, Dr. Hartig, or Dr. Kelly; and that there was no alteration of structural integrity. He recommended a functional capacity evaluation to assess the validity of the restrictions that the claimant claimed to have. He concluded that, within a reasonable medical probability, the claimant lacked the desire to return to his prior level of employment.

The employer also submitted a questionnaire in which Dr. Larkin was asked to respond affirmatively or negatively to the following statement: "Is there any objective medical evidence to support the conclusion that [the claimant's] work either caused or contributed to cause any permanent harmful change or injury to the low back?" He

responded negatively.

Among the contested issues were causation and whether there was an injury under the Act. Summarizing the evidence, the ALJ noted that Dr. Larkin "concluded there was no objective medical evidence to support the conclusion that [the claimant's] work caused or contributed to any permanent harmful change or injury." This analysis followed:

This ALJ finds that [the claimant] has not met his burden of proving a work-related injury. This finding is based upon the opinions of Dr. Larkin and the diagnosis of degenerative disc disease. This ALJ finds, based on the opinions of Dr. Larkin, that [the claimant's] condition is the result of the natural aging process and is not work-related. Based on the opinion of Dr. Larkin, this ALJ finds there is a lack of objective medical findings indicating a harmful change caused by the work activities. "Injury" does not include the effects of the natural aging process. (emphasis added).

As pertinent to this claim, KRS 342.0011(1) defines an "injury" as being:

[A]ny work-related traumatic event or series of traumatic events, including cumulative trauma . . . which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.

Under the statute, establishing the presence of a harmful change and establishing if it is caused by work-related trauma require different standards of proof.

The court explained in Gibbs v. Premier Scale Co./Indiana Scale Co., 50 S.W.3d 754 (Ky. 2001), that objective medical findings must support a diagnosis in order to establish the presence of a harmful change. In Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001), the court rejected an argument that the cause of a harmful change must also be proved by objective medical findings. As stated in Brown-Forman Corp. v. Upchurch, 127 S.W.3d 615, 621 (Ky. 2004) (citations omitted), "Medical causation must be proved to a reasonable medical probability with expert medical testimony, but KRS

342.0011(1) does not require it to be proved with objective medical findings."

We acknowledge that objective medical findings may lead a physician to conclude that one cause of a condition is more medically probable than another, but the legal standard for proving causation is reasonable medical probability. Therefore, a medical opinion that addresses a different standard of causation is flawed and does not constitute substantial evidence. Dr. Larkin's response to the employer's questionnaire is such an opinion. Because the ALJ relied on Dr. Larkin's opinions, including his response to the questionnaire, and because it is unclear that the ALJ applied the correct standard for decision, the matter must be reconsidered using the correct standard.

The decision of the Court of Appeals is affirmed.

Lambert, C.J., and Cunningham, McAnulty, Minton, Noble and Scott, J.J., concur.
Schroder, J., not sitting.

COUNSEL FOR APPELLANT,
H. K. SYSTEMS, INC.:

HON. RONALD J. POHL
POHL, KISER & AUBREY, P.S.C.
SUITE 100 FIRST NATIONAL BUILDING
167 WEST MAIN STREET
LEXINGTON, KY 40511

COUNSEL FOR APPELLEE,
DANNY WHALEN:

HON. GREGORY N. SCHABELL
BERGER, COX & NIENABER, P.S.C.
401 MADISON AVENUE
COVINGTON, KY 41011