

**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**NOT TO BE PUBLISHED OPINION**

**THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**

Supreme Court of Kentucky

FINAL

2007-SC-000088-WC

DATE 11-26-07 Eli A. Grady, P.C.

ENERSYS, INC.

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS  
2006-CA-001752-WC  
WORKERS' COMPENSATION NO. 04-77539

JOSEPH WALTERS, HON. LAWRENCE SMITH,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant sustained two work-related injuries: a neck injury that caused no pre-existing active impairment and a subsequent shoulder injury that brought the dormant neck injury into disabling reality, resulting in surgery for a herniated cervical disk and a permanent impairment rating. The Workers' Compensation Board and the Court of Appeals affirmed, but the employer continues to assert that there was no substantial evidence of a second injury and that the evidence compelled a finding that the disc herniation existed before the second injury occurred. We affirm.

The claimant was born in 1956 and has a ninth-grade education as well as a GED. He began working for the defendant-employer in March, 2003, and also did

the use of a mechanical hoist to stack and stow batteries that weighed from 45 to 150 pounds. He testified that he woke up on July 22, 2004, with a "crick" in his neck and sought medical treatment but did not report an injury to his employer. Then, on August 14, 2004, the hoist caught on his shirt sleeve and raised him two to three inches off the floor, wrenching his shoulder. He notified his employer and sought treatment at Pattie A. Clay Regional Hospital for right shoulder pain. Subsequent medical testimony indicated that he was diagnosed with a shoulder strain or sprain.

Marymount Hospital records indicated that the claimant was treated again on August 15-16, 2004, for right shoulder pain due to a work-related injury of August 14, 2004, and that x-rays revealed no osseous abnormalities of the shoulder and acromioclavicular joints. The history included a neck injury that had occurred two months earlier. Although the employer's human resources director informed the workers' compensation insurance carrier of the injury, the carrier denied coverage on the ground that the claimant had been treated for similar symptoms before the injury.

Medical records indicated that the claimant saw Dr. Farooqui (his family physician), weeks before the alleged injury, complaining of neck and shoulder pain. On July 22, 2004, he gave a history of moving a heavy object recently and of subsequent neck pain, primarily on the right side and into the right shoulder. He denied any tingling or weakness in the limb. Dr. Farooqui noted that movement of the neck was restricted due to pain and that there was some tenderness around the right trapezius muscle, but movement of the shoulder joint was not restricted; hand grip was normal; and right upper extremity muscle reflexes were intact. On July 30, 2004, the claimant complained to Dr. Farooqui's partner of greater right shoulder and neck pain, and he

exhibited a limited range of motion in his shoulder, especially on abduction. Thus, he was scheduled for a right shoulder MRI and advised to return in two weeks.

Two days after the alleged injury, on August 16, 2004, Dr. Farooqui noted that the claimant complained of right shoulder pain and had decreased movement in the shoulder joint, but his hand grip and reflexes were normal and movement of his neck was not restricted. His assessment was of right shoulder pain with possible neck pain. He took the claimant off work. Noting that he was already scheduled for a right shoulder MRI, Dr. Farooqui indicated that he would request a scan of the cervical spine as well. On August 23, 2004, he noted that a cervical spine x-ray was normal, but the MRI showed signs of stenosis and spur formation; therefore, he referred the claimant for a neurosurgical evaluation.

When deposed in August, 2005, Dr. Farooqui explained that physicians look for tingling and weakness or numbness in the extremities after a spine injury because they are signs of acute nerve root impingement, which must be addressed promptly. Unless such signs are present, MRI is not usually performed immediately because it is costly. Dr. Farooqui found it difficult to say whether or not the claimant's herniated disc was present in July, 2004; however, he acknowledged that the absence of any radicular symptoms before August 16, 2004, would be consistent with a history of catching a sleeve in a hoist on August 14, 2004, and being pulled off the ground. He also stated that he was not aware of such an incident because it did not appear in his notes.

Dr. Tutt, a neurosurgeon, first saw the claimant on August 24, 2004. He received a history of the August 14, 2004, incident, an immediate onset of "sharp right sided neck and shoulder pain, and subsequent pain down the right arm associated with

numbness, tingling, and paresthesia." He performed a physical examination, reviewed the MRI, and concluded that the incident caused a large, acute, right C5-6 disc herniation that compressed the right C6 nerve root and required immediate surgery. Dr. Tutt performed a discectomy and fusion shortly thereafter. In a letter, dated December 13, 2004, Dr. Tutt stated that if the history he received was correct, the disc herniation was probably caused by the August 14, 2004, accident. He noted that the workers' compensation claim was denied based on an assertion that the injury or symptoms preceded the alleged date of injury but stated that he did not know the basis for the assertion. He assigned a 25% permanent impairment rating (DRE Cervical category IV) and stated that the claimant's present physical capacity permitted a return to the work performed at the time of the injury.

After reviewing the claimant's medical records and a portion of his deposition, Dr. Tutt indicated in a report that the neck and shoulder pain certainly had its origin prior to the alleged accident. When deposed subsequently on the claimant's behalf, Dr. Tutt testified that he had no record before August 14, 2004, "of any arm symptoms; that is, pain going beyond the shoulder, or pain going – or any numbness, tingling or paresthesia." Thus, his opinion was that the accident worsened or exacerbated a pre-existing neck condition. He explained that neck pain is the first symptom of an evolving disc protrusion, followed by radiation to the shoulder and then by radiation further down the arm. He also explained that the claimant's neck, shoulder, and arm pain were due to the same condition, an evolving herniated disc. He saw no other way to view the matter in the absence of shoulder pathology, and he indicated that the significance of the event on August 14 was that the pain began to radiate beyond the shoulder.

On cross-examination, Dr. Tutt was asked if he would agree that the history the claimant gave regarding the onset of neck and shoulder pain beginning August 14, 2004, was untrue or incorrect. He testified that although it was clear from the medical records that the claimant had neck and shoulder pain prior to August 14, he knew of nothing to indicate that he experienced arm pain with numbness and tingling prior to that date. Although he acknowledged that symptoms related to the disc herniation existed before August 14, he pointed out that most individuals with a disc herniation do not require surgery. Thus, he could not exclude the possibility that the incident on August 14 had further worsened an evolving herniation. On re-direct, he stated that it was possible the incident worsened the claimant's condition but that he could not prove that was what occurred.

The claimant testified that he received short-term disability benefits when he was off work for the surgery and that his employer terminated him upon his return for an alleged "falsification of documents" regarding statements he made denying an injury or workers' compensation claim prior to August 14, 2004. He stated at the hearing that he had no restrictions and took no prescription pain medication. He returned to his logging business in about March, 2005.

The parties stipulated that the claimant allegedly sustained work-related injuries on July 21, 2004, and August 14, 2004, but that the employer was given notice of only the August injury. Relying on the claimant's testimony and medical evidence, the ALJ determined that he was injured on July 21, 2004, when moving batteries at work; however, any claim for that injury must be dismissed due to his failure to give timely notice. Noting that the evidence supported the parties' stipulation, the ALJ found that

the claimant also sustained a work-related injury on August 14, 2004. Turning to the question of pre-existing active disability, the ALJ acknowledged the several reasons that the employer raised for doubting the claimant's credibility. Relying on McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001), the ALJ concluded, however, that objective medical evidence supported the claimant's allegation of a work-related injury on August 14, 2004, that brought into disabling reality the dormant neck injury already evolving from the July incident. The award based income benefits on a 25% permanent impairment rating and included a period of temporary total disability, with a dollar-for-dollar credit to the employer for the short-term disability benefits that it paid. The employer appealed following the denial of its petition for reconsideration.

McNutt Construction v. Scott, *supra*, explains that where work-related trauma causes a pre-existing, dormant degenerative condition to become disabling and result in functional impairment, that harmful change is an injury under KRS 342.0011(1) because the trauma was the proximate cause producing it. Here, the ALJ found that the August 14, 2004, incident caused an injury because it caused the dormant neck injury that occurred in July, 2004, to become disabling. The employer asserts that the medical opinions were based on an erroneous history and that Dr. Tutt's opinion of causation rose only to the level of possibility rather than to the required level of reasonable medical probability.

Not until after August 14, 2004, did the medical records indicate that the claimant experienced tingling and numbness or weakening in his right arm or pain below his right shoulder. Dr. Farooqui's lack of awareness of an August 14, 2004 injury was not

material to his explanation that a disc that has herniated sufficiently to impinge on a nerve root results in tingling and numbness or weakness in the affected limb. Likewise, the claimant's failure to inform Dr. Tutt of the July, 2004 symptoms was not material to Dr. Tutt's opinion of causation because he based the opinion on knowledge that neck and shoulder pain were present in July, 2004, but that no recorded symptoms below the right shoulder were present until after August 14, 2004. On that basis, he concluded that the disc began to herniate in July, 2004, when the neck and shoulder symptoms began, but that the herniating disc did not begin to encroach on the nerve root until sometime after August 14, 2004, when the symptoms below the shoulder began. Although Dr. Tutt also made statements regarding a "possibility" that the August 14 incident caused the herniation to worsen and regarding his inability to "prove" that it did, Brown-Forman Corp. v. Upchurch, 127 S.W.3d 615 (Ky. 2004), points out that it is the quality and substance of a physician's testimony, not the use of any magic words, that determines whether an opinion regarding causation rises to the level of reasonable medical probability. When considered in its entirety, the medical evidence clearly supported a conclusion that the incident on August 14, 2004, caused the pre-existing herniated disc to herniate further, require surgery, and result in a permanent impairment rating. Absent any medical evidence that a portion of the claimant's permanent impairment rating would have existed before August 14, 2004, the evidence clearly did not require pre-existing disability to be excluded.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.



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