

**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**NOT TO BE PUBLISHED OPINION**

**THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**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-000566-WC

DATE 9-11-08 E.L.A. Grant P.C.

UNITED PARCEL SERVICE, INC.

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS  
2006-CA-002630-WC  
WORKERS' COMPENSATION BOARD NO. 05-01650

PAUL ANDERSON,  
HON. GRANT ROARK,  
ADMINISTRATIVE LAW JUDGE, AND  
WORKERS' COMPENSATION BOARD

APPELLEES

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

An Administrative Law Judge (ALJ) found that the claimant's Kienbock's disease and bilateral carpal tunnel syndrome were work-related and produced a 17% permanent impairment rating. The Workers' Compensation Board (Board) affirmed the decision, and the Court of Appeals affirmed the Board. Appealing, the employer continues to assert that the ALJ erred by relying on Dr. Zerga's opinion regarding causation but on Dr. Moskal's opinion regarding the permanent impairment rating. We affirm because the employer has failed to show an abuse of the ALJ's discretion as the finder of fact or to show that overwhelming evidence compelled a finding that Kienbock's disease was a pre-existing active condition at the time of injury.

The claimant played the guitar professionally and also worked as a part-time

package handler for United Parcel Service (UPS). He worked four-hour shifts and sorted one package about every two seconds. They weighed up to 70 pounds each. He testified that he also helped UPS co-workers move some computers in October or November 2003, began to have problems with his right hand, and notified his supervisor that he had sprained his wrist. He sought treatment with Dr. Moskal, who diagnosed bilateral carpal tunnel syndrome, which was worse in the right wrist, and subsequently diagnosed Kienbock's disease in the right wrist as well.<sup>1</sup> The claimant stated that he quit playing the guitar in October or November 2003 but continued to perform his usual duties as a UPS package handler until March 24, 2004, when a package broke open, causing the motor that it contained to fall and fracture the great toe of his left foot. He performed light-duty work until May 2004, when he underwent the first of three wrist surgeries. Although his physicians released him to return to work in June 2005, UPS had no work within his lifting restrictions. He attempted to work elsewhere but eventually quit.

Dr. Moskal first saw the claimant in January 2004, at which time diagnostic testing revealed bilateral carpal tunnel syndrome, worse on the right. In April 2004, he noted that the claimant experienced right wrist pain that was not consistent with carpal tunnel syndrome. Subsequent MRI revealed the presence of Kienbock's disease with early fragmentation but no evidence of collapse. Dr. Moskal referred the claimant to Dr. Gupta for surgery.

The claimant first saw Dr. Gupta of the Kleinert Kutz Hand Care Center in May

---

<sup>1</sup> Taber's Cyclopedic Medical Dictionary 1118 (19<sup>th</sup> ed. 2001), defines Kienbock's disease being as a slow degeneration of the lunate bone of the wrist that usually results from trauma. It indicates that the goals of treatment are to reduce pain, maintain motion, and prevent carpal collapse and arthritis.

2004. He noted symptoms of bilateral carpal syndrome, some cubital tunnel symptoms, extensive median small vessel disease, and Kienbock's disease, with significant avascularity of the lunate bone. He obtained a history of bilateral arterial disease in the legs, high blood pressure, and smoking. Physical exam revealed that the claimant's right wrist was very stiff. Dr. Gupta performed a carpal tunnel release on the right wrist in May 2004 and later scheduled a proximal row carpectomy on the wrist, which Dr. Wolff performed. Dr. Wolff also performed a subsequent left carpal tunnel release.

Dr. Goddy, an orthopedic surgeon, evaluated the claimant at his attorney's request in December 2005. He received a history of a work-related right wrist sprain in October 2003 and the subsequent diagnoses of bilateral carpal tunnel syndrome and Kienbock's disease on the right. In his opinion, a work-related injury caused the conditions to be disabling. He assigned an 11% permanent impairment rating (6% for carpal tunnel syndrome, 7% for the carpectomy) and attributed no portion of the impairment to a pre-existing dormant or active condition. He stated that the claimant was medically disqualified from returning to work as a package handler.

Dr. Zerga, a neurologist, conducted an independent medical evaluation for the employer in January 2006. He prepared a report and was later deposed. Dr. Zerga noted that the claimant underwent surgery on the right wrist in May and October 2004 and on the left wrist in April 2005. He assigned a 6% permanent impairment rating for carpal tunnel syndrome, which he attributed entirely to the claimant's work at UPS, but deferred a rating for the carpectomy and Kienbock's disease to an orthopedics specialist because it was an orthopedic condition. Dr. Zerga stated that he was not an expert in orthopedics but understood the condition to be a vascular problem, related to

an infarct of the lunate bone. He stated that the claimant had significant peripheral vascular disease, which would have predisposed him to Kienbock's disease and probably played a role in its development. When questioned regarding the cause of the claimant's Kienbock's disease, Dr. Zerga apportioned 75% to active peripheral vascular disease, for which the claimant took medication, and 25% to the repetitive nature of his work for UPS. He thought it unlikely that the claimant retained the physical capacity to return to the type of work that he performed at the time of injury.

Dr. Moskal evaluated the claimant for the employer in February 2006. Among other things, he noted that the claimant suffered from peripheral vascular disease and had recently quit smoking. Although he imposed work restrictions and assigned a 17% permanent impairment rating for the carpal tunnel syndrome and Kienbock's disease, he stated that neither condition was work-related. He indicated that the claimant's 31-year history of tobacco use and peripheral vascular disease might have played a role in causing the latter condition. Noting, however, that the claimant reported experiencing wrist pain and dropping a package, he stated that "one could consider an aggravation as an element."

Among other things, the parties contested whether the claimant's conditions resulted from his work. Relying on Dr. Zerga's testimony, the ALJ determined that claimant's work caused bilateral carpal tunnel syndrome and that it aroused a pre-existing, dormant peripheral vascular condition into disabling Kienbock's disease. Noting that Dr. Moskal had rated both conditions, the ALJ relied on his testimony that they warranted a 17% permanent impairment rating for the purpose of calculating income benefits. The employer appealed following the ALJ's denial of its petition for

reconsideration.

The employer complains that although Dr. Moskal stated that neither the carpal tunnel syndrome nor the Keinbock's disease was work-related, the ALJ awarded income benefits based on the permanent impairment rating that he assigned to the conditions. Moreover, despite an express reliance on Dr. Zerga's opinion regarding causation, the ALJ failed to apportion the permanent impairment rating due to Kienbock's disease as Dr. Zerga had done.

KRS 342.285 designates the ALJ as the finder of fact with the sole authority to weigh the evidence in workers' compensation proceedings. Among other things, KRS 342.285(2) directs the Board to determine if a finding is "clearly erroneous on the basis of the reliable, probative, and material evidence contained in the whole record" or if an ALJ's decision is "arbitrary or capricious or characterized by an abuse of discretion." KRS 342.290 directs the Court of Appeals to review matters subject to review by the Board and errors of law arising before the Board. As explained in Paramount Foods v. Burkhardt, 695 S.W.2d 418 (Ky. 1985), and Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986), KRS 342.285 gives an ALJ the sole authority to determine the quantity, quality, character, and substance of evidence and prohibits a finding that is reasonable under the evidence from being reversed on appeal. A review of the evidence indicates that the ALJ applied the law correctly and rendered a reasonable finding regarding causation in this case; therefore, the Board and the Court of Appeals did not err in affirming it.

The claimant had the burden to show that he sustained a work-related injury that resulted in a permanent impairment rating. The employer sought to exclude some or all

of his permanent impairment rating due to Kienbock's disease from the income benefit calculation and, thus, had the burden to show that Kienbock's disease was not work-related or that it was an active condition before the injury occurred. Although Dr. Moskal testified that the claimant's Kienbock's disease was not work-related, the ALJ relied on Dr. Zerga concerning causation. He testified that the claimant's work contributed to the development of the condition. The court determined in McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001), that if work causes a pre-existing, dormant condition to be disabling and results in a permanent impairment rating, the condition is compensable as an injury under the post-1996 Workers' Compensation Act.

Dr. Zerga stated that Kienbock's disease was an orthopedic problem and that the claimant suffered from an active peripheral vascular condition, which predisposed him to developing the disease. He also stated that the claimant's repetitive work played a role in its development. Although he apportioned 75% of the cause of the Kienbock's disease to active peripheral vascular disease and 25% to the repetitive work at UPS, Dr. Zerga did not state that the disease existed or resulted in a permanent impairment rating before the claimant sustained an injury at UPS. Moreover, no other physician stated that it did. Although the ALJ mischaracterized the peripheral vascular condition (rather than the predisposition that it created to Kienbock's disease) as being dormant, the ALJ determined reasonably that the claimant's work caused what had been a dormant condition to become symptomatic and result in the permanent impairment rating. That harmful change was an injury and was compensable.

The employer asserts that to rely on the permanent impairment rating that Dr.

Moskal assigned constituted an abuse of the ALJ's discretion because Dr. Moskal did not assign the rating for a work-related condition. We disagree. The cause of a harmful change in the human organism and the permanent impairment rating that it produces are two entirely different matters. Nothing prevents an ALJ from relying on one expert's opinion concerning causation and a different expert's opinion concerning the degree of permanent impairment. Likewise, nothing prevents an ALJ from rejecting an expert's opinion regarding causation but relying on the expert's opinion regarding impairment.

The decision of the Court of Appeals is affirmed.

Minton, C.J., and Abramson, Cunningham, Noble, Schroder, and Scott, JJ.,  
concur. Venters, J., not sitting.

COUNSEL FOR APPELLANT,  
UNITED PARCEL SERVICE, INC.:

H. DOUGLAS JONES  
JONES, DIETZ & SWISHER, PLLC  
51 CAVALIER BLVD., SUITE 260  
P.O. BOX 95  
FLORENCE, KY 41022

CHRISTOPHER NEWELL  
JONES, DIETZ & SWISHER, PLLC  
10503 TIMBERWOOD CIRCLE, SUITE 213  
LOUISVILLE, KY 40233

COUNSEL FOR APPELLEE,  
PAUL ANDERSON:

CHARLES E. JENNINGS  
JENNINGS LAW OFFICE  
239 SOUTH FIFTH STREET  
SUITE 412  
LOUISVILLE, KY 40202