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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: MAY 19, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000501-WC

PALM BEACH COMPANY — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2009-CA-002309-WC
WORKERS' COMPENSATION NO. 91-06109

NORMA TARTAR;
THE PAIN TREATMENT CENTER (D/B/A
STONE ROAD SURGERY CENTER);
DR. BALLARD WRIGHT;
HONORABLE EDWARD HAYS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) found in this medical reopening that the claimant's cervical spine condition resulted from the work-related injury she sustained in 1990 and that the disputed medical treatment was reasonable and necessary. The Workers' Compensation Board and the Court of Appeals affirmed. Appealing, the employer maintains that a previous ALJ's failure to attribute any occupational disability to the cervical condition in the initial award precluded a finding at reopening that KRS 342.020(1) provided medical benefits for the condition. We affirm for the reasons stated herein.

The claimant was born in 1949 and has a GED but no vocational or other specialized training. She began to work for the defendant-employer in 1968 as an industrial seamstress. On July 8, 1990 she noticed a knot at the top of her right shoulder as well as numbness on the right side of her face and in fingers on her right hand. She was right-handed and attributed the symptoms to recurrent problems with the feeding mechanism of her sewing machine, which caused her to have to grip the cloth she was sewing and pull it through the machine. She informed her supervisor; sought medical treatment; and later filed a claim for a repetitive trauma injury. She continued to work as of the date her claim was heard.

The record indicates that conservative treatment failed, after which the claimant was referred to Dr. Travis, a neurosurgeon. He diagnosed cervical radiculopathy in October 1990 for which he recommended exercise and traction. Dr. Travis also found some evidence of carpal tunnel syndrome that he did not consider clinically significant.

Dr. El-Naggar, a neurosurgeon, noted in April 1991 that the claimant complained of neck pain and right arm pain with numbness. She reported experiencing inter-scapular pain while working at a sewing machine in 1989 and again in July 1990. The pain radiated from her neck into her right arm and forearm and sometimes the entire arm became numb. Dr. El-Naggar noted evidence of mild carpal tunnel syndrome. He also noted signs of right C5 and C6 radiculopathies, but a cervical spine MRI performed in May 1991 revealed

no abnormalities. He attributed her severe neck pain to a probable joint injury that might heal very slowly and did not recommend carpal tunnel surgery.

Dr. Sammarco, an orthopedic surgeon, performed bilateral carpal tunnel releases in May 1992. He attributed the need for surgery to the claimant's repetitive work. Dr. Lane, the orthopedic surgeon who treated her initially, assigned a 4% impairment rating to the cervical complaints and a 5% rating to the carpal tunnel condition.

Testifying for the employer in 1993, Dr. Primm diagnosed degenerative cervical disc disease to which he assigned a 3% to 5% impairment rating, attributing half of the rating to the arousal of pre-existing degenerative changes. He considered the left carpal tunnel release to be unnecessary. Dr. Corwin diagnosed bilateral carpal tunnel syndrome, post surgery, but found no causal connection between the condition and any incident in July 1990.

The opinion and award rendered by ALJ Terry in June 1994 indicated that the contested issues consisted of whether the claimant's "condition" was work-related; the extent and duration of any occupational disability; the apportionment of liability; and the reasonableness and necessity of the claimant's medical treatment, including the carpal tunnel surgeries.

ALJ Terry found that the claimant sustained "a work-related injury" that resulted in a 10% occupational disability under KRS 342.0011(11) and *Osborne v. Johnson.*[1] Relying on Dr. Sammarco's testimony, the ALJ found that the

[1] 432 S.W.2d 800 (Ky. 1968).

bilateral carpal tunnel syndrome resulted from the claimant's repetitive work since 1968 and stated further:

> While plaintiff may also have some cervical condition which was aroused by these repetitive activities at work, her occupational disability is due to bilateral carpal tunnel syndrome rather than to any cervical complaints.

Noting Dr. Primm's opinion that most of the claimant's problems resulted from the degenerative cervical condition, ALJ Terry found instead that "her principal complaints [were] related to carpal tunnel syndrome." The ALJ characterized the claimant's injury as a classic *Haycraft*[2] case and imposed all liability for benefits on the employer.

ALJ Terry rejected the employer's argument that the carpal tunnel surgeries were unreasonable and/or unnecessary and found them to be compensable. Moreover, the ALJ awarded such medical benefits "for the cure and relief from the effects of the injury . . . as may reasonably be required at the time of the injury and thereafter during disability." Neither party appealed.

The claimant's cervical condition continued to be symptomatic and to require medical treatment after the award. Dr. Kennedy treated the condition until he closed his office. The claimant then obtained treatment from Dr. Manney and other physicians affiliated with the Pain Treatment Center.

Dr. Manney noted in September 2004 that various narcotic pain medications, trigger point injections, and various types of blocks had met with

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[2] *Haycraft v. Corhart Refractories Co.*, 544 S.W.2d 222 (Ky. 1977) (to the extent that work causes a pre-existing degenerative condition to produce impairment sooner than it would have done otherwise, the condition itself is an injury).

limited success. A cervical spine MRI reviewed in November 2004 revealed a C5-6 disc protrusion that caused minimal stenosis. Convinced that the cervical facet joints were the pain generators, Dr. Manney recommended injections in August 2005 and later recommended additional facet joint and trigger point injections, blocks, and changes in pain medication. Dr. Manney noted in August 2007 that the claimant's pain was under control with her current medications.

Dr. Wright's diagnoses in September 2007 included degenerative disc disease, myofascial pain, and generalized arthritis. The claimant's medications at that time included Percocet, Neurontin, Phenergan, Ultram, Paxil, Prevacid, Celebrex, Lidoderm, and Topamax.

The employer paid for treating the cervical condition from July 1990 until August 2008 without dispute. On August 15, 2008 a drug urine screen was negative for oxycodone although Percocet was prescribed for pain resulting from the condition.[3] On August 27, 2008 Dr. Olash recommended denying pre-authorization for proposed bilateral cervical facet block injections as being unnecessary. He noted that the claimant had complained of neck pain and headaches since 1990; had been on narcotic pain medications for years; and received only two days of pain relief from facet blocks performed in 2005. He concluded that there was no reason to subject her to the risk of an invasive procedure that had been tried previously and failed.

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[3] Medical evidence submitted subsequently indicates that oxycodone is a component of Percocet.

This appeal concerns a motion to reopen and medical dispute filed by the employer in September 2008 regarding the compensability of narcotic pain medication and injections prescribed to treat the cervical condition. The employer did not assert that the expenses were unreasonable or unnecessary. It asserted instead that they were unrelated to the carpal tunnel condition, stating that it was the only condition for which benefits were awarded in 1994. The motion was granted and assigned to ALJ Hays for adjudication.

Dr. Snider evaluated the claimant for the employer in September 2008. He noted that she appeared to have suffered a cervical sprain or strain injury in 1990 and diagnosed chronic cervical/trapezius strain. He considered her to be at maximum medical improvement from the injury as of the date that she quit working; saw no objective findings to justify the use of multiple medications; saw no indication for Percocet; and viewed the negative drug screen as raising a question of diversion or non-compliance. He found no evidence to justify the use of Neurontin; recommended that Tramadol, Phenergan, and Prevacid be discontinued; and opined that anti-inflammatory medication would be reasonable.

An October 2008 letter from Dr. Katherine Ballard of the Pain Treatment Center stated that the claimant could be compliant with her prescription for Percocet yet have a negative drug screen because she took the drug only on an "as needed" basis and the prescribed dose was rather small. Dr. Ballard opined that the claimant was an appropriate candidate for opioid medication and injective therapy.

The claimant testified that she continued to work for her employer as a seamstress until 2001, when she quit for reasons unrelated to her claim. She stated that she is right-handed and that her right arm and shoulder are more symptomatic than her left. She stated that her medication regimen had changed little since 2004; that she took Percocet most days but not every day; and that the prescribed medications enabled her to function. She discussed the efficacy of the various types of neck and shoulder injections she had received previously and described the purpose of the recommended injections as being long-term pain control.

The employer pointed to ALJ Terry's conclusion that the claimant's occupational disability resulted from bilateral carpal tunnel syndrome, not a cervical condition, and argued that the decision controlled the medical dispute. The claimant noted, however, that ALJ Terry's opinion contained numerous references to the intertwined symptoms involving her arms, shoulders, and neck, including the evidence that her degenerative cervical condition was aroused by her repetitive work. She argued that ALJ Terry did not limit her injury to the carpal tunnel condition but found that her occupational disability resulted from the carpal tunnel condition. ALJ Hays agreed.

The May 2009 decision noted that reports from the case manager for the employer's insurance carrier revealed a close involvement in the claimant's medical care throughout the 18 years since her injury. Moreover, the employer paid for treating the cervical condition without questioning its compensability

until the present dispute. Relying heavily on *FEI Installation, Inc. v. Williams,*[4] ALJ Hayes noted the longstanding relationship between impairment and disability and observed that impairment demonstrates the existence of a harmful change in the human organism, *i.e.*, an injury. Noting that ALJ Terry acknowledged the cervical condition's existence in 1990 and did not find it to be temporary, ALJ Hays concluded that the fact it was not occupationally disabling at that time did not preclude medical benefits. Convinced that the work-related injury caused a loss of use and/or derangement of the claimant's neck and shoulder that had been present since 1990 and continued to require medical treatment, ALJ Hays found reasonable and necessary treatment of the condition to be compensable. The order entered on reconsideration found specifically that the treatment rendered and proposed by physicians at the Pain Treatment Center was reasonable and necessary.

Appealing, the employer asserted that the award entered at reopening did not conform to Chapter 342 because it exceeded the scope of the 1994 award. The employer noted that KRS 342.020(1) provided medical benefits "during disability." It concluded, therefore, that ALJ Terry's failure to attribute any occupational disability to the cervical condition barred a conclusion that KRS 342.010(1) provided medical benefits for the condition. Having failed to convince the Board or the Court of Appeals, the employer continues to maintain that ALJ Hayes erred by awarding medical benefits for the cervical condition at reopening and that the decision should not have been affirmed.

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[4] 214 S.W.3d 313, 318 (Ky. 2007).

Stating that "the time for correction of the original award has long since passed," the employer argues that the Court of Appeals failed to give proper significance to ALJ Terry's failure to find that the cervical condition was work-related or to find that it produced occupational disability. It also argues that injuries that do not result in a permanent impairment rating are not disabling and do not warrant future medical benefits. We disagree.

Nothing in the claimant's initial award precluded medical benefits from being awarded specifically for the cervical condition at reopening. ALJ Terry's recitation of the evidence indicates that the parties' dispute largely concerned whether the claimant suffered from bilateral work-related carpal tunnel syndrome; whether the condition produced occupational disability; and whether the surgery performed in 1992 was reasonable and necessary. It also indicates that the immediate effects of the July 1990 injury concerned the claimant's neck, right shoulder, and right arm and that she was diagnosed with cervical radiculopathy from the outset.

The employer did not dispute that the cervical condition was work-related. Dr. Primm testified on its behalf that the condition was aroused at least partially by the claimant's work and that it produced a permanent impairment rating.[5] Dr. El-Naggar indicated that the neck injury was probably temporary, but Dr. Lane assigned an impairment rating. Absent any specific findings concerning the cervical condition, we construe ALJ Terry's statement

[5] A condition could be work-related and cause a permanent impairment rating but be found reasonably to have caused no permanent occupational disability under the 1990 version of KRS 342.730(1) and KRS 342.0011(11).

that the claimant's work might have aroused a cervical condition but that her occupational disability resulted from carpal tunnel syndrome to mean only that the cervical condition was not occupationally disabling.

The employer paid for treating the claimant's cervical condition without dispute until September 2008. Causation became a contested issue for the first time in the reopening. Thus, ALJ Hays did not err by determining that nothing in ALJ Terry's decision precluded findings from being made concerning whether the cervical condition was work-related or whether the proposed medical treatment was reasonable and necessary.

Both in 1990 and at reopening KRS 342.020(1) provided compensation for such medical treatment "as may reasonably be required at the time of the injury and thereafter during disability." KRS 342.020(1) was amended in 1994 to state also that "[t]he employer's obligation to pay benefits specified in this section shall continue for so long as the employee is disabled regardless of the duration of the employee's income benefits."[6]

FEI Installation, Inc. v. Williams was decided in 2003. It concerned whether KRS 342.020(1) a worker who reached maximum medical improvement with no permanent impairment rating was entitled to future medical benefits. The court noted that the 1994 amendment to KRS 342.020(1) clearly "separate[ed] the duration of medical benefits from that of income benefits. The employer states correctly that impairment and disability

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[6] 1994 Ky. Acts ch. 181, Part 5, § 17.

are not synonymous,[7] but the concepts have had a longstanding relationship under Chapter 342 because impairment produces disability, both physical and occupational. Noting that relationship, the *Williams* court concluded that the phrase "during disability" extended the entitlement to medical benefits for so long as a work-related injury caused impairment as defined in the Fifth Edition of the AMA *Guides to the Evaluation of Permanent Impairment (Guides).*[8] As so defined, the entitlement does not depend on whether impairment rises to the level that warrants a permanent impairment rating or income benefits.

We reject the employer's assertion that *FEI Installation, Inc. v. Williams* was decided wrongly and find no significance in the fact that the claimant's injury occurred in 1990. Although KRS 342.0011(11) defined the term "disability" in 1990 as being "a decrease of wage earning capacity due to injury," Chapter 342 used the terms impairment and disability interchangeably at times. The 1990 version of KRS 342.730(1)(b) based partial occupational disability awards on either the "percentage of disability" as determined by the *Guides* (i.e., the worker's permanent impairment rating) or by the "percentage of disability as determined under KRS 342.0011(11)," whichever was greater. We conclude, therefore, that the 1990 version of KRS 342.020(1), like the present version, used the phrase "during disability" to refer to physical disability, *i.e.*, impairment.

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[7] *Roberts Brothers Coal Co. v. Robinson*, 113 S.W.3d 181 (Ky. 2003).

[8] The *Guides* define impairment as being "a loss, loss of use, or derangement of any body part, organ system, or organ function." *Guides to the Evaluation of Permanent Impairment* 2 (5th ed. 2001).

ALJ Hays did not err by awarding medical benefits for the claimant's cervical condition at reopening. Thus, the Board and the Court of Appeals did not err by affirming the decision.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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