

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE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UNPUBLISHED KENTUCKY APPELLATE DECISIONS,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BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED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

2011-SC-000443-WC

EMERSON POWER TRANSMISSION

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS
CASE NO. 2010-CA-001880-WC
WORKERS' COMPENSATION NO. 08-96400

CARL E. OVERLY;
HONORABLE CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Court of Appeals and the Workers' Compensation Board determined that substantial evidence supported an Administrative Law Judge's (ALJ's) finding that the claimant sustained a work-related cumulative trauma injury to his low back. Appealing, the employer continues to assert that the finding of causation was unreasonable and should not have been affirmed.

We affirm. Dr. Becherer's testimony alone would not support a finding of causation. It provided additional support for the claimant's testimony concerning the onset of symptoms and the type of work that he performed and Dr. Owen's opinion, which together provided substantial evidence of causation.

The claimant was born in 1951 and completed high school. He began his 34-year career with the defendant-employer as a machine operator and was promoted eventually to the position of set-up technician. He worked up to ten hours per day for six to seven days per week. He testified that the job required him to lift heavy objects; to squat, bend, and turn frequently; and to tug and push parts. He stated that he placed parts on a roller to send them down the line and maneuvered parts that were in the wrong position into place. He worked with parts that weighed about a thousand pounds and were larger than a conference room table. The heaviest weighed five thousand pounds, maybe more. He used a hoist to help move the parts, but he had to "manhandle them a lot." Eventually he developed symptoms in his hands, knee, back, and shoulder, which he attributed to his work.

This appeal concerns the cause of the claimant's back condition only. The ALJ found the other conditions not to be work-related.

The claimant testified that he began to experience a tingling sensation in his right foot in mid-2007, which he related to gout. He was referred to Dr. Becherer after conservative treatment failed and he began to experience leg and lower back pain. Dr. Becherer performed surgery, which relieved his back pain but not the numbness in his foot. The claimant testified that a subsequent motor vehicle accident for which he was seen in the emergency room did not alter his condition and the record indicates that emergency room personnel identified no acute injury. His application for benefits alleged a work-related cumulative trauma injury to his low back and right leg as of August 1, 2007.

The claimant testified at the hearing that he attributed his back pain to his work because it involved a lot of lifting. He stated that his back began to hurt in August 2007 and then stated, "I was lifting. That's all I do is repetitive lifting." He thought initially that he had arthritis but stated that his symptoms "kept getting worse and worse as I stand and stuff." His doctors informed him in December 2007 that his problem was not arthritis, "It was a disc."

Dr. Fine saw the claimant in April 2007 for complaints of right foot and ankle pain. Dr. Fine reported a normal neurological exam and noted evidence of tenderness on the lateral aspect of the foot. He diagnosed a calcaneal navicular coalition of the right foot, pronation, and gout.

Dr. Werthammer saw the claimant in December 2007 for complaints of low back pain for the past four months, which increased with standing, and of pain that radiated down the right leg. Having found a patch of decreased temperature sensitivity along the lateral aspect of the right lower leg but no muscle weakness or neurological findings, Dr. Werthammer diagnosed right lumbar radiculopathy; advised the claimant to continue physical therapy; and ordered an MRI. The test revealed multilevel neural foraminal stenosis, most prominent at L4-5.

Dr. Becherer saw the claimant on referral on January 14, 2008 for complaints of severe low back pain that radiated into his right hip and leg if he stood for longer than 30 seconds and for complaints of numbness and pain in the right leg and foot. The claimant reported that the back pain began at work in August 2007, when he was standing for prolonged periods of time, and

worsened thereafter. He also reported that the pain tended to increase when he was standing and decrease when lying down. Six weeks of physical therapy failed to improve and sometimes aggravated the condition. Dr. Becherer diagnosed a herniated disc and lumbar stenosis at L4-5 on the right and performed surgery later in January 2008.

Dr. Becherer testified when deposed in February 2010 that he could not within a reasonable degree of medical probability attribute the claimant's back condition to his work. He stated that no specific event caused the condition and that the MRI revealed pre-existing degenerative disc disease, which was not work-related. He also stated that the activities required by the claimant's work could have exacerbated the condition, causing it to become symptomatic.

Dr. Owen evaluated the claimant in September 2009. After examining him, reviewing his medical records, and taking a history that included a description of the claimant's customary work as being "heavy industrial labor," Dr. Owen diagnosed work-related low back pain with laminectomy at L4-5. Dr. Owen recorded a history of low back pain that began "in the January 2008 time period;" started with pain in the right foot; was initially thought to be arthritis; but eventually was diagnosed as being radiculopathy. Dr. Owen noted also that Dr. Becherer performed surgery at L4-5 following a positive MRI; that the claimant's pain improved with surgery but worsened with lifting or carrying activities; and that he continued to have some numbness in his foot. Physical examination revealed a diminished vibratory sense in the third toe and a positive straight leg raise, both on the right side. Dr. Owen assigned

a 12% permanent impairment rating based on the laminectomy; restricted the claimant from lifting more than 10 pounds and from prolonged standing or walking; and advised him to avoid recurrent bending, squatting, and stooping.

Dr. Tutt performed an evaluation for the employer in October 2009, at which time the claimant reported low back pain and also reported right foot numbness that began in 2006 or 2007 and spread to his leg. Dr. Tutt diagnosed multilevel lumbar degenerative osteoarthritis with status post-operative laminectomy for spinal stenosis at L4-5. He assigned a 10% impairment rating to the claimant's back condition but opined that no harmful change in the human organism resulted from the claimant's work and, more specifically, that his back condition bore no relationship to his work. An addendum to his report stated that the MRI performed in December 2007 revealed longstanding degenerative changes at L4-5 as well as other abnormalities and did not alter the previously-stated opinions.

Dr. Snider evaluated the claimant for the employer in February 2010, noting complaints of low back pain and right foot numbness. Physical examination revealed slightly diminished lumbar lateral bending but normal lumbar extension. Having also reviewed the claimant's medical records and obtained a history, Dr. Snider diagnosed chronic low back pain as well as multilevel degenerative changes of the lumbar spine and noted the surgery performed at L4-5. Dr. Snider found it impossible to apportion the claimant's condition to work without speculation and presumption because he did not

have an acute trauma at work. Likewise, Dr. Snider found no obvious work-related component to the claimant's impairment rating.

The ALJ determined that the work the claimant performed for his employer hastened the onset of symptoms from his dormant, non-disabling back condition, causing it to become active and disabling. In doing so, the ALJ relied on the claimant's "credible" testimony concerning the onset of symptoms and the work he performed; on Dr. Owen's opinion; and on Dr. Becherer's testimony that individuals with the type of degenerative disk disease the claimant has are more prone than others to develop disk herniations from repetitive bending, stooping, lifting, or lifting beyond their means. The ALJ also noted Dr. Becherer's testimony that if the claimant's allegations concerning the nature of his work and the onset of symptoms were accurate, his work might have exacerbated his condition and caused it to become painful.

The ALJ awarded a period of temporary total disability following the claimant's surgery; found that his permanent disability was partial; and awarded income benefits based on the 12% impairment rating assigned by Dr. Owen. The ALJ tripled the claimant's benefits based on the restrictions that Dr. Owen assigned primarily for the low back and enhanced his benefits further based on his age.

A petition for reconsideration by the employer asserted that the record contained insufficient evidence of a work-related cumulative trauma injury to the low back. The employer noted no physician testified to the presence of such an injury and asserted that the ALJ erred by failing to address

discrepancies between the history the medical providers received and the claimant's allegation that his back condition resulted from the cumulative effect of heavy lifting. The employer emphasized that Dr. Becherer found no objective medical evidence that the claimant's work caused his back condition; made clear that he did not receive a history of back pain arising while bending and lifting; and recorded a history of foot symptoms while standing at work. Noting that Dr. Owen recorded a history of back complaints beginning in January 2008 and that the alleged injury date was August 2007, the employer argued that the ALJ erred by failing to address the discrepancy or its argument that *Cepero v. Fabricated Metals Corp.*¹ precluded the ALJ from relying on Dr. Owen's opinion concerning causation. The ALJ denied the petition.

I. STANDARD OF REVIEW.

The claimant had the burden to prove every element of the claim, including causation.² KRS 342.285 designates the ALJ as the finder of fact and provides that the ALJ's decision is "conclusive and binding as to all questions of fact" and, together with KRS 342.290, prohibits the Board or a reviewing court from substituting its judgment "as to the weight of evidence on questions of fact." As a consequence, the ALJ has the sole discretion to determine the quality, character, and substance of evidence.³

¹ 132 S.W.3d 839, 842 (Ky. 2004).

² See *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).

³ *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985).

An ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof.⁴ KRS 342.285(2) and KRS 342.290 limit review of an ALJ's decision to determining whether the ALJ "acted without or in excess of his powers;"⁵ whether the decision "was procured by fraud;"⁶ or whether the decision was erroneous as a matter of law.⁷ Legal errors would include whether the ALJ misapplied Chapter 342 to the facts or made a clearly erroneous finding of fact. A party who appeals a finding that favors the party with the burden of proof must show that no substantial evidence supported the finding, *i.e.*, that the finding was unreasonable under the evidence.⁸

II STANDARD FOR PROVING CAUSATION.

Chapter 342 considers the arousal of a dormant, non-disabling, non-work-related condition to be a work-related injury if activities required by an individual's work cause or hasten the onset of disabling symptoms.⁹ In other words, if work contributes significantly to causing such a condition to become disabling, that work-related harmful change in the human organism constitutes an injury under KRS 342.0011(1). Although KRS 342.0011(1)

⁴ *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

⁵ KRS 342.285(2)(a).

⁶ KRS 342.285(2)(b).

⁷ KRS 342.285(2)(c), (d), and (e). *See also American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Commission*, 379 S.W.2d 450, 457 (Ky. 1964).

⁸ *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986); *Mosley v. Ford Motor Co.*, 968 S.W.2d 675 (Ky. App. 1998); *REO Mechanical v. Barnes*, 691 S.W.2d 224 (Ky. App. 1985).

⁹ *McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854, 859 (Ky. 2001).

requires the presence of a harmful change to be proved with objective medical findings, it does not require the change's cause to be proved with such findings.¹⁰

A finding of medical causation must be based on evidence from medical experts in instances where causation is neither observable nor apparent to a layperson.¹¹ An ALJ's authority to weigh conflicting evidence includes the authority to decide which medical opinion concerning causation is the most credible and reliable.¹² When found to be credible, a worker's testimony provides substantial evidence concerning factors relevant to causation such as the type and physical demands of activities required by the individual's work; the symptoms experienced; and any correlation observed between performing various types of activities and the onset and progression of symptoms.

III. ANALYSIS.

The claimant's testimony and Dr. Owen's opinion supported a reasonable finding that the physical demands of the claimant's work caused the pre-existing condition to become symptomatic and disabling, *i.e.*, caused a harmful change in the human organism. Although Dr. Becherer's testimony would not alone have supported a finding of causation, it provided additional support for the ALJ's conclusion that the claimant's work exacerbated his pre-existing

¹⁰ *Staples, Inc. v. Konwelski*, 56 S.W.3d 412, 415-16 (Ky. 2001).

¹¹ *Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc.*, 618 S.W.2d 184, 186-87 (Ky. App. 1981).

¹² *Brown-Forman Corp. v. Upchurch*, 127 S.W.3d 615, 621 (Ky. 2004).

dormant degenerative condition, causing it to become symptomatic and disabling.

Contrary to the employer's assertion, *Cepero* did not require the ALJ to disregard Dr. Owen's opinion of causation simply because he indicated in the history portion of the Form 107 that the claimant's back pain began in January 2008 rather than August 2007. In *Cepero* the injured worker failed to inform the only physicians who opined that his present knee condition was work-related about a previous injury to the same knee that confined him to a wheelchair for two months and caused damage that would not have repaired itself without a surgery that he did not undergo. Finding the ALJ's reliance on the opinions to be clearly erroneous, the court determined that a medical opinion that is based on a "substantially inaccurate or largely incomplete" medical history and that is unsupported by any other credible evidence cannot constitute substantial evidence.¹³ *Cepero* does not govern the present facts.

Unlike *Cepero*, the present case does not involve an opinion of causation that was based on a medical history so flawed as to render the opinion unreliable and, thus, inadequate to support a finding of causation. The discrepancy at issue presently reveals no more than that the claimant was a poor historian; that he misspoke; or that Dr. Owen recorded the date erroneously. Even if we were to assume for the purpose of discussion only that the claimant gave Dr. Owen a history of back pain that began in January 2008, nothing indicates that Dr. Owen based his opinion of causation on that date

¹³ 132 S.W.3d at 842.

rather than on the entire history that he recorded; on the claimant's description of the physical demands of his work; and on the symptoms and objective findings noted in the claimant's medical records by Dr. Becherer in January 2008.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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