

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 30, 2018

CLAIM NO. 201560232

ADS WASTE HOLDINGS, INC.

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

PHILIP JONES and
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

ALVEY, Chairman. ADS Waste Holdings, Inc. ("ADS") appeals from the June 24, 2018 Opinion, Award, and Order, and the July 20, 2018 Order on petition for reconsideration rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ"). The ALJ determined Phillip Jones ("Jones") sustained a work-related left thumb injury and left carpal tunnel syndrome, for which he awarded temporary total disability benefits, permanent partial disability benefits, and medical benefits.

On appeal, ADS argues substantial evidence does not support a finding that the mechanism of injury caused the wrist fracture. ADS argues substantial evidence does not support the finding of work-related carpal tunnel syndrome, and the ALJ exceeded his scope of authority in making such finding. ADS argues the ALJ misconstrued statements made by Dr. Martin Favetto and did not afford it the right to rebut the evidence. Because the ALJ demonstrated an accurate understanding of the evidence and substantial evidence supports his determination, we affirm.

Jones filed a Form 101 alleging he injured his left wrist/hand/thumb on November 19, 2015, while climbing into a truck in the course and scope of his employment with ADS. Jones began working for ADS in September 2015 as a truck driver. He last worked for ADS in February 2016, when he was terminated due to lack of work.

Jones testified by deposition on March 9, 2018, and at the hearing held April 25, 2018. Jones was born in August 1959, and is left-handed. Jones worked for ADS as a garbage truck driver from September 2015 through February 2016. His shift normally began at 6:00 a.m., and he finished between 2:00 and 4:00 p.m. In addition to his garbage collection rounds, Jones also performed pre-trip truck inspections. Jones utilized a three point system to enter and exit the truck, which entailed using the step and two handrails. On November 19, 2015, Jones testified he was in the garage bay at ADS and had just repaired a hydraulic line. He started the truck and began walking around it to perform an inspection. He heard a loud pop or

bang and noticed hydraulic fluid on the floor. He ran to the truck to shut off the engine and in the process of doing so, he bent his thumb backward.

Jones testified he was unsure exactly how he injured himself, but thought he caught his left thumb on the hand bar as he jumped into the truck. He stated when it happened, he noticed pain in his left thumb. He exited the truck to walk to the offices to inform his supervisor of the fluid leak. As he walked, the pain worsened and extended from his left thumb and into his left wrist. Jones testified he thought he had hyperextended his left thumb. Jones told his supervisor about his pain and the hydraulic fluid leak. Jones testified the incident occurred near the end of his shift. Once he completed his shift, Jones drove home and iced his wrist while he waited for his wife. Upon her insistence, Jones went to the emergency room that evening. Jones denied another traumatic event or left wrist injury occurred between the time he left work and when he went to the emergency room.

X-rays taken at the emergency room revealed a left wrist fracture. At the request of ADS, Jones treated at Concentra Medical Center the following day. Jones treated with Dr. Favetto from November 2015 to April 2016. Dr. Favetto performed surgery on December 2, 2015 addressing the left wrist fracture. Jones then began treating with Dr. Brandon Devers in February 2017, primarily for numbness and tingling in the left thumb and wrist. Dr. Devers performed a left carpal tunnel release on February 24, 2017. Jones testified that prior to the December 2015 surgery, he experienced “some light” numbness and tingling in his left thumb and wrist which worsened after the December 2015 surgery.

In support of his claim, Jones filed the records from Baptist Health, Concentra Medical Center, Dr. Favetto, and Dr. Devers. Jones sought treatment at the Baptist Health emergency room on November 19, 2015, and was seen at approximately 11:00 p.m. Jones reported a twisting injury to his left wrist and thumb earlier that day at work. He reported a hydraulic line came off the truck, he jumped out and “thinks caught thumb bent it back.” The record also states, “An injury may have occurred. (pt unsure if he hurt it at work or not, pain from thumb to wrist).” His symptoms included pain and swelling, but no tingling, numbness or weakness. A left wrist x-ray demonstrated a displaced comminuted fracture of the distal radius. The following day, Jones presented at Concentra Medical Center with a left thumb/wrist injury occurring on November 19, 2015 while at work. The record indicates Jones’ “wrist bent backwards.” Jones complained of left wrist pain radiating into his left hand and forearm, as well as grip weakness, decreased range of motion, stiffness, swelling and tenderness. He was diagnosed with a left radius fracture and restricted from using his left upper extremity.

Jones began treating with Dr. Favetto on November 24, 2015. Jones reported, “he was climbing onto his truck and his arm was caught in the radial and slightly twisted. He noticed pain in his wrist immediately and was eventually . . . diagnosed with a fracture of the distal radius.” Dr. Favetto noted the x-rays showed a comminuted intra-articular fracture of the distal radius that involved the radial metaphysis. Dr. Favetto noted the complexity of the fracture and the appearance of a high-energy injury. He stated:

It is difficult to explain how the mechanism that the patient describes and the injury match. The only logical

explanation is that the patient may have an area of weakness in his radius some form of tumor is the most likely explanation so I would consider this to be a pathological fracture of the distal radius.

Dr. Favetto ordered a CT scan of the distal radius to rule out a pathological fracture and scheduled surgery. The December 2, 2015 operative report reflects Dr. Favetto performed an ORIF of the distal radius fracture. It also noted the CT scan did not show any bone tumors, and a bone sample was sent to pathology for analysis. The pathological report noted findings consistent with a fracture and no evidence of malignancy. Jones followed up with Dr. Favetto, who restricted Jones to one-handed work, ordered physical therapy, and placed Jones in a cast or brace through January 21, 2016. On that date, Jones reported he was doing well with little to no pain and Dr. Favetto returned him to regular duty work. Jones returned on March 22, 2016, with complaints of left hand weakness and difficulty carrying out activities. Dr. Favetto recommended therapy and restricted Jones to light duty work. Jones returned on April 19, 2016, complaining again of hand weakness despite a healed fracture.

Jones began treating with Dr. Devers on February 9, 2017. Jones reported ongoing left wrist and thumb pain, as well as hand and wrist weakness, despite healed fractured following surgery. Dr. Devers noted Jones' wrist pain had improved over time, but he developed basilar thumb pain, and intermittent numbness and tingling in his hand, most prominently within the thumb. Dr. Devers ordered studies for suspected carpal tunnel syndrome and provided a thumb splint. The February 17, 2017 EMG/NCV report noted moderate to severe left and right carpal tunnel syndrome and mild bilateral neuropathy at the elbow. Dr. Devers

performed a left endoscopic carpal tunnel release on February 24, 2017. He also ordered physical therapy and administered an injection into the left thumb for the CMC joint arthritis. Dr. Devers consistently diagnosed osteoarthritis of the carpometacarpal joint of the thumb; wrist joint pain; and carpal tunnel syndrome. He also consistently noted Jones is asymptomatic in the right hand.

Jones filed Dr. Anthony McEldowney's December 8, 2017 report. He noted Jones reported, and medical records confirmed, a work-related injury to the dominant left wrist and thumb on November 19, 2015. Jones reported as he was getting into the truck to turn it off, he hit his left hand and wrist, and bent his left thumb backward. Dr. McEldowney diagnosed a closed complex comminuted fracture left distal radius and left carpal tunnel syndrome, likely dormant and asymptomatic prior to a closed fracture of the left distal radius. He opined Jones' injury caused his complaints, noting he arrived to work on November 19, 2015, without restrictions and performed full work activities, with no previous injuries or conditions to his left wrist or hand region. He opined Jones attained maximum medical improvement ("MMI") on August 24, 2017, and requires no additional treatment other than home exercises. Dr. McEldowney assessed a 4% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides the Evaluation of Permanent Impairment, and opined Jones retains the physical capacity to return to work. Dr. McEldowney opined Jones did not have an active impairment prior to the work injury.

ADS filed the report of Dr. Ronald Burgess, who examined Jones on February 15, 2018. Jones reported that on November 19, 2015, he hit his thumb,

bending it backwards, when he went into the truck to shut off the hydraulic line. He reported the incident occurred near the end of his shift, he then went home and iced his wrist, and went to the emergency room later that same night. Dr. Burgess noted Jones reported the accident occurred at 1:00 p.m. on November 19, 2015, in an incident report and that the emergency room records noted Jones was triaged at 10:40 p.m. that same night, approximately nine hours later. He also noted Dr. Favetto's opinion that the comminuted fracture of the distal radius was not consistent with a thumb injury. Dr. Burgess then stated, "I agree with Dr. Favetto and feel that, within medical probability, the injury occurred in the interval between ceasing work at 2 o'clock in the afternoon and arriving at the triage at 10:40." Dr. Burgess found Jones is at MMI following the surgical repair of the fracture. Dr. Burgess also opined Jones' complaints of numbness and tingling were not documented until after his final visit to Dr. Favetto on April 19, 2016, and are not directly related to his injury. He also noted the subsequent EMG/NCV study on February 17, 2017 showed moderately severe bilateral carpal tunnel syndrome, but only slight worsening on the affected side. Therefore, he opined Jones' carpal tunnel syndrome is not work-related. He also noted he could not explain why Jones reported significant loss of sensation in his thumb with normal sweat. Regardless of causation, Dr. Burgess assessed a 7% impairment rating.

The ALJ found Jones sustained a work-related injury to his left thumb and left carpal tunnel syndrome due to the November 19, 2015 accident. The ALJ rejected the opinions of Drs. Burgess and Favetto. The ALJ noted Dr. Favetto opined the mechanism of the accident could not have caused the accident absent a

pre-existing weakness in the thumb. The ALJ found that in this instance, no pre-existing weakness had been rated, treated, nor resulted in any restrictions prior to November 19, 2015, and at most, would be a pre-existing, dormant condition. The ALJ noted Dr. Burgess' opinion on causation appeared to be rooted in the same rationale, and based in part, on Dr. Favetto's opinion.

The ALJ stated as follows regarding the carpal tunnel syndrome: "That the carpal tunnel syndrome did not appear until later is not only prohibitive it is not unexpected given that carpal tunnel syndrome is a progressive condition and one of the known risk factors is an injury to the area around the carpal tunnel." The ALJ found probative the fact Jones promptly reported his injury when it occurred. He also rejected the theory posed by ADS that another event occurred between the original injury and going to the emergency room nine hours later. He found credible Jones' testimony that he went home, and sought treatment after prompted by his wife. The ALJ found this testimony not unusual and not indicative that the injury is not work-related. The ALJ adopted the 4% impairment rating assessed by Dr. McEldowney, awarded indemnity and medical benefits for the work-related left thumb and left carpal tunnel syndrome. He likewise found both surgeries compensable.

ADS filed a petition for reconsideration arguing Dr. Favetto never rendered an opinion as to causation. It pointed to the records establishing that Dr. Favetto suspected an area of weakness, most likely a tumor, contributed to the fracture. However, a subsequent biopsy and CT scan ruled out any bone tumors. ADS alleged the ALJ made a deduction not supported by evidence that Dr. Favetto

believed there was an actual pre-existing weakness in the wrist attributable to a tumor. ADS further alleged the ALJ did not state the biopsy was ordered to determine whether a tumor existed and did not spell out that the pathology report ruled out malignancy. ADS argued Dr. Favetto never opined there was any actual weakness in the wrist, but only merely suspected it.

ADS also argued Dr. Burgess' opinion that the injury occurred after Jones' left work is consistent with Dr. Favetto's opinion that his story does not support the occurrence of an injury. ADS argued Dr. McEldowney failed to discuss the existence of pathological weakness, only took an oral history from Jones, did not review the medical records, did not discuss the amount of time it took for him to arrive at the emergency room, and did not reference Dr. Favetto's concerns.

ADS concluded by stating the opinion did not contain an accurate summary of the evidence, and that Dr. Burgess' opinion is more persuasive than Dr. McEldowney's. Therefore, ADS requested the ALJ reconsider his opinion, and find the evidence does not support the existence of a work-related injury.

The ALJ rendered an order on July 20, 2018, overruling ADS' petition, and stating as follows:

. . . . The Defendant takes issue with the use of the phrase "pre-existing weakness" in my summary of the opinions of Dr. Favetto. The Defendant argues that Dr. Favetto did not say that. Certainly in workers' compensation the term "pre-existing" is typically a highly specific and relevant term. The ALJ regrets any miscommunication this may have caused. However, in this matter the phrase is a distinction without a difference. Dr. Favetto did say that he suspects the Plaintiff had or has a non-work-related cause for the weakness in his hand. Among other, speculative possibilities, is a tumor or some sort of pathology. I have

rejected that. The remainder of the Petition is a re-argument of the merits. The Petition is OVERRULED.

On appeal, ADS argues there is no substantial evidence supporting causation. ADS notes the evidence ultimately disproved Dr. Favetto's theory of weakness in the wrist, namely a tumor. ADS emphasizes Dr. Favetto did not render an opinion regarding weakness of the wrist after the biopsy demonstrated no malignancy. ADS asserts, "without evidence of tumors, there is no evidence of weakness. And, with no evidence of weakness, there is no conceivable way that the mechanism could have caused the injury." ADS argues the ALJ misconstrued Dr. Favetto's theory of weakness with actual evidence of weakness. ADS asserts the ALJ relies, "solely on Dr. Favetto's disproved theory that there was a weakness in the wrist" and that he erred in this finding since the record does not support a finding of weakness. Without evidence of weakness, Drs. Favetto and Burgess indicate the fracture could not have been caused by the reported mechanism.

ADS additionally argues substantial evidence demonstrates the mechanism of injury was insufficient to cause the fracture. It again points to the records of Drs. Favetto and Burgess, as well as Jones' description of the mechanism of injury. ADS asserts Dr. McEldowney failed to address causation, and provided no discussion regarding the mechanism of injury, the fracture, or Dr. Favetto's theory of a pre-existing weakness. ADS also states the ALJ improperly rejected the time lapse between the alleged incident and the emergency room visit as irrelevant.

ADS argues substantial evidence does not support the finding of work-related carpal tunnel syndrome. ADS points to the lapse of time between his initial injury and documented complaints of numbness or tingling. It also points to the fact

Dr. Burgess noted the carpal tunnel is bilateral with only a slight worsening on the affected side.

ADS argues the medical evidence does not support the ALJ's statement that the delay in symptomology is not unexpected given carpal tunnel syndrome is a progressive condition and a risk factor is an injury to the area around the carpal tunnel. ADS asserts it was not afforded the right to rebut this evidence which is not in the record.

Finally, ADS argues in its reply brief that Dr. McEldowney's opinions do not constitute substantial evidence regarding causation, and Jones offered no rebuttal to its argument regarding his carpal tunnel syndrome.

We find ADS' appeal is nothing more than a re-argument of the evidence before the ALJ. ADS impermissibly requests this Board to engage in fact-finding and substitute its judgment as to the weight and credibility of the evidence. That is not the Board's function. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

As the claimant in a workers' compensation proceeding, Jones had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Jones was successful in that burden, the question on appeal is whether substantial evidence of record supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The 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 adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). As long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Causation is a factual issue to be determined within the sound discretion of the ALJ as fact-finder. Union Underwear Co. v. Scarce, 896 S.W.2d 7 (Ky. 1995); Hudson v. Owens, 439 S.W.2d 565 (Ky. 1969). When the question of causation involves a medical relationship not apparent to a lay person, the issue is properly within the province of medical experts and an ALJ is not justified in disregarding the medical evidence. Mengel v. Hawaiian-Tropic Northwest and

Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981). Medical causation must be proven by medical opinion within “reasonable medical probability.” Lexington Cartage Company v. Williams, 407 S.W.2d 395 (Ky. 1966). The mere possibility of work-related causation is insufficient. Pierce v. Kentucky Galvanizing Co., Inc., 606 S.W.2d 165 (Ky. App. 1980). In addition, although objective medical evidence must support a harmful change diagnosis, it is unnecessary to prove causation of any injury through objective medical findings. Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001).

The ALJ found Jones sustained a work-related injury to his left thumb and carpal tunnel syndrome, and based his determination primarily upon Dr. McEldowney’s opinion and Jones’ testimony. Jones testified he believed he injured his wrist near the end of his shift on November 19, 2015, as he was jumping into the truck. Jones believed, albeit erroneously, he hyperextended his thumb when it bent backwards on one of the bars. He noticed some pain at the time and notified his supervisor of the incident. Once he completed his shift, Jones drove home and iced his wrist while he waited for his wife. Upon her recommendation, Jones went to the emergency room that same evening. Jones denied another traumatic event or left wrist injury occurred between the time he left work and went to the emergency room. The medical records demonstrate Jones went the emergency room the evening of the accident, and was diagnosed with the fracture of the distal radius. Jones also testified he experienced some numbness and tingling in his left hand and thumb prior to the ORIF performed by Dr. Favetto, but that his symptoms worsened or intensified thereafter.

Dr. McEldowney examined Jones on December 8, 2017. He specifically noted he reviewed the records from Baptist Health Lexington, Dr. Favetto, Saint Joseph East Hospital, Dr. Devers, Dr. Leung, and Performance Physical Therapy. He also noted the results of the November 19, 2015 x-ray, the left wrist CT scan dated November 24, 2015, and the EMG/NCV study dated February 17, 2017. Dr. McEldowney recorded a history provided by Jones, and performed a physical examination. He diagnosed a closed complex comminuted fracture of the left distal radius and left carpal tunnel syndrome, likely dormant and asymptomatic prior to a closed fracture of left distal radius. He stated as follows:

CAUSATION

Within reasonable medical probability, was the plaintiff's injury the cause of his complaints? Yes, as this patient arrived to work on November 19, 2015 without restrictions and performing full work activities, with no previous injuries or conditions to his left wrist or hand region.

EXPLANATION OF CAUSAL RELATIONSHIP

Because of work-related injury left wrist on November 19, 2015, there has been a harmful change to the human organism of Philip Jones, who has required 2 separate surgical procedures with their inherent risks and complications, and despite appropriate conservative and surgical treatment, this patient has residual tingling on the ulnar aspect of his left thumb, mild range of motion loss in his left wrist and left thumb, and mild residual strength loss in his left hand. It is my opinion that this patient does not require any additional treatments other than home exercises for his left wrist and hand injuries.

Dr. McEldowney's opinions constitute substantial evidence supporting the ALJ's determination. The challenges by ADS of Dr. McEldowney's opinion go to the weight of the evidence, and are not an adequate basis to reverse on appeal.

Dr. McEldowney unequivocally attributed the fracture and carpal tunnel syndrome to the November 19, 2015 incident and stated his opinions were formulated within the realm of reasonable medical probability. He specifically noted the carpal tunnel syndrome was dormant and asymptomatic prior to the fracture. The opinions rendered by Dr. McEldowney constitute substantial evidence upon which the ALJ was free to rely.

The ALJ clearly understood the opinions rendered by Dr. Favetto when reviewing his summary of the evidence, analysis and order on reconsideration. In his summary, the ALJ noted Dr. Favetto stated the mechanism of injury and “high-energy” injury did not match, and that the most likely explanation is an existing area of weakness. The ALJ noted the subsequent pathology report was consistent with a fracture. The ALJ then rejected Dr. Favetto’s opinions, stating,

Dr. Favetto said that the mechanism of accident could not have caused the injury absent some pre-existing weakness in the thumb. This is very well possible. But since this pre-existing weakness was never rated, ratable, treated or gave rise to any restrictions prior to November 19, 2015 it would be, at most, a pre-existing, dormant condition.

The ALJ clearly stated Dr. Favetto only suspected a non-work-related cause for the weakness in his hand in the order on reconsideration. The ALJ further clarified in the order on reconsideration that Dr. Favetto only suspected a non-work-related cause for the weakness in his hand, and that the remainder of his opinion remained unchanged. Based upon the above, we conclude the ALJ had an accurate understanding of the evidence before him. We do not agree with ADS that the ALJ solely relied upon Dr. Favetto’s disproved theory of a weakness in the wrist in

making his determination. Instead, the ALJ exercised his discretion in relying upon other evidence in the record and adequately explained why he found Drs. Favetto and Burgess unpersuasive.

We also disagree with ADS' characterization of the ALJ's findings regarding the time lapse between the incident and the visit to the emergency room. The ALJ did not find the time lapse was irrelevant as asserted by ADS. Rather, the ALJ found credible Jones' testimony that he went home after work, and after his wife came home, she urged him to go to the hospital. The ALJ specifically found that this was neither unusual nor indicative that the injury is not work-related. As fact-finder, the ALJ acted well within his discretion in accepting Jones' explanation regarding the nine hour time lapse between the work incident and seeking medical attention. Square D Co. v. Tipton, *supra*.

Accordingly, the June 24, 2018 Opinion, Award, and Order, and the July 20, 2018 Order on petition for reconsideration rendered by Hon. Chris Davis, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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