

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002630-WC

UNITED PARCEL SERVICE, INC.

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-01650

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

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, HOWARD, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: United Parcel Service (UPS) appeals from an opinion of the Workers' Compensation Board affirming the decision of the Administrative Law Judge awarding Paul Anderson permanent partial disability benefits based on a 17% functional impairment rating related to his carpal tunnel syndrome and Kienböck's disease. UPS contends that the Board erred when it affirmed the ALJ's award which was based on the

opinion of Dr. Joseph Zerga regarding causation but did not follow Dr. Zerga's opinion as to apportionment. Alternatively, UPS argues that the ALJ abused his discretion when he relied on Dr. Zerga as to causation but awarded benefits based on Dr. Michael Moskal's impairment rating. It also contends that the Board substituted its judgment for that of the ALJ when it found that Anderson did not have a pre-existing active condition. We find no error and affirm.

In 1997, Anderson began work at UPS as a part-time package handler. He claims that as a result of his repetitive work duties, he gradually developed pain and numbness in both hands. In October or November 2003, he first reported the problem to his supervisor and first sought medical attention on January 21, 2004, with an orthopedic hand surgeon, Dr. Moskal. Anderson was able to perform his regular duties as a package handler until March 24, 2004, when he suffered a work-related toe injury.

On May 3, 2004, Anderson underwent carpal tunnel surgery on his right hand. On October 26, 2004, he had a second surgery on his right hand and, on April 8, 2005, he underwent a carpal tunnel release of the left hand.

Anderson was not released by his treating physicians to return to work until June 7, 2005, when he was placed on restrictions including maximum occasional lifting of 20 pounds and maximum repetitive lifting of 10 pounds. Because of these restrictions, Anderson could not return to work at UPS and found other employment, first managing a car wash and then doing abstract title work for a real estate title company.

As a result of his continued problems with his hands, he eventually left that employment and, at the time of the hearing, remained unemployed.

Records from Dr. Moskal reveal that in January 2004, nerve tests indicated carpal tunnel syndrome in his right and left wrists. On April 26, 2004, Dr. Moskal diagnosed atypical wrist pain; left carpal tunnel syndrome; and right carpal tunnel syndrome. An MRI of the right wrist revealed Kienböck's disease with early fragmentation. In February 2006, Dr. Moskal performed an independent medical evaluation. He diagnosed bilateral wrist contracture; status post carpal tunnel release; status post proximal carpectomy on the right; interfalangeal joint contractures of multiple fingers bilaterally; and, left wrist pain. He further diagnosed peripheral vascular disease and borderline diabetes. Dr. Moskal stated that Anderson's Kienböck's disease and carpal tunnel syndrome were not caused by his work. He assessed a 17% impairment to the body as whole.

Dr. Amit Gupta first saw Anderson on May 3, 2004, and diagnosed moderately severe carpal tunnel syndrome and Kienböck's disease. Dr. Gupta performed a denervation and decompression of the distal radius and later scheduled Anderson for a right proximal row carpectomy. He stated that Anderson would require vocational rehabilitation.

Dr. Leonard Goddy evaluated Anderson and completed a medical questionnaire. He diagnosed right proximal row carpectomy and bilateral carpal tunnel syndrome. He indicated that Anderson's condition was brought into disabling reality by

his work at UPS and assigned a 6% impairment for the bilateral carpal tunnel syndrome and 7% impairment for the right proximal row carpectomy.

At the request of UPS, on January 5, 2006, Dr. Joseph Zerga examined Anderson and diagnosed mild residual bilateral carpal tunnel and Kienböck's disease. As to causation, Dr. Zerga stated:

Question: In your opinion, what's the cause of his Kienböck's disease?

Answer: Well. I think its a combination, Kienböck's disease is not a frequent condition. And certainly I know your-all's experience too, you see a lot of people that do a lot of repetitive activity, and I bet you haven't seen many people with Kienböck's disease. I think the major factor in the development of his Kienböck's disease is his peripheral vascular disease. However, I do feel also that his work, the repetitive activity, played a role as well.

Question: And if you had to, Doctor, how would you apportion that?

Answer: I would apportion 75 percent to his active peripheral vascular disease, and it should be noted that he's on medication for that, is being actively treated by his physician so I would apportion 75 percent to that disease and 25 percent to the work activity as UPS.

He deferred to an orthopedic physician an assessment of an impairment rating for the Kienböck's disease.

After reviewing the evidence and the parties' contentions, the ALJ found that Dr. Zerga's opinion as to causation was most persuasive. As to Dr. Zerga's opinion, regarding Anderson's pre-existing condition, the ALJ stated:

[T]he Administrative Law Judge interprets Dr. Zerga's opinion to mean that plaintiff had a pre-existing, dormant peripheral vascular condition which was aroused into disabling Kienböck's disease by plaintiff's work activities.

Thus, the ALJ concluded, Anderson's bilateral carpal tunnel syndrome and Kienböck's disease were work-related and compensable.

The standard of review in workers' compensation cases has often been recited:

On appellate review, the ALJ's findings of fact are entitled to considerable deference and will not be set aside unless the evidence compels a contrary finding. *Bullock v. Peabody Coal Co.*, 882 S.W.2d 676 (Ky.1994). However, the ALJ's and the Board's application of the law are reviewed *de novo*. *Combs v. Gaffney*, 282 S.W.2d 817 (Ky.1955); *Hardy-Burlingham Mining Co. v. Hurt*, 238 Ky. 589, 38 S.W.2d 460 (1931); *Sears Roebuck & Co. v. Dennis*, 131 S.W.3d 351 (Ky.App.2004).

Finely v. DBM Technologies, 217 S.W.3d 261, 264-65 (Ky.App. 2007).

The ALJ is free to “pick and choose among conflicting medical opinions” and has the sole authority to determine whom to believe. *Copar, Inc. v. Rogers*, 127 S.W.3d 554, 561 (Ky. 2003). Thus, the ALJ was free to rely upon Dr. Zerga's opinion in regard to causation but to rely on that of Dr. Moskal as to the impairment rating. *Id.*

UPS argues that because the ALJ found Dr. Zerga's opinion as to causation to be the most persuasive, he was required to rely on Dr. Zerga's opinion as to apportionment. The fallacy in its contention is that Dr. Zerga did not state that there was any pre-existing active impairment attributable to causes other than his work at UPS.

The ALJ interpreted Dr. Zerga's opinion to mean that Anderson had a pre-existing, dormant condition which was aroused by his work into disabling Kienböck's disease. When a “work related trauma causes a dormant degenerative condition to

become disabling and to result in functional impairment, the trauma is the proximate cause of the harmful change; hence, the harmful change comes within the definition of an injury.” *McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854, 859 (Ky. 2001). Consistent with the evidence, the Board noted that neither Dr. Zerga nor Dr. Moskal stated that Anderson's Kienböck's disease was an active condition prior to his work injury.

The Board correctly recited the law applicable to the compensability of a pre-existing condition when it stated:

It is well established that in permanent partial disability cases, before a condition may be characterized as “active” the underlying pre-existing condition must be symptomatic and must be capable of being rated pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment (“Guides”) immediately prior to the occurrence of the work-related injury. *Roberts Brothers Coal Co. v. Robinson*, 113 S.W.3d 181 (Ky. 2003).

The Board did not, as UPS suggests, substitute its findings for that of the ALJ but instead agreed with the ALJ's interpretation of Dr. Zerga's testimony and the conclusion that no portion of Anderson's condition was active. Emphasizing that neither Dr. Zerga nor Dr. Moskal stated the Kienböck's disease was active immediately prior to Anderson's work-related injury and that Dr. Moskal's impairment rating did not attribute any percentage to a pre-existing active condition, the Board agreed with the ALJ that Anderson's disease was a dormant condition brought into disability by his repetitive work duties.

We can find nothing in the record that compels a result different from that reached by the ALJ and affirmed by the Board and no error of law requiring reversal.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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