



IN THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

ROBERT MARCH,

Appellant,

v.

TREASURER OF THE STATE OF
MISSOURI - CUSTODIAN OF THE
SECOND INJURY FUND,

Respondent.

WD84377

OPINION FILED:
August 31, 2021

Appeal from the Labor and Industrial Relations Commission

Before Division Three: Edward R. Ardini, Jr., Presiding Judge, and
Mark D. Pfeiffer and W. Douglas Thomson, Judges

Introduction

This workers' compensation case serves as a reminder that the question of causation is a medical question. Further, while we defer to the Labor and Industrial Relations Commission's ("Commission") credibility determinations—including as to expert medical testimony—and the Commission is free to choose between *conflicting* expert medical opinions or to otherwise choose to *disbelieve* all of the expert medical opinions, where the Commission finds that certain uncontradicted expert medical testimony as to causation is credible, it is *not* entitled to supply its own contrary lay opinion as to causation absent expert medical testimony to support that contrary

opinion. Here, the Commission has done just that, Appellant Robert March (“Employee”) challenges the sufficiency of evidence to support the Final Award Denying Compensation (“Final Award”), and we conclude that the Final Award must be reversed and remanded to the Commission for further proceedings as directed in today’s ruling.

Factual Background

Employee (born 1/3/1962) began working for Milbank Manufacturing (“Employer”) in 1996. Employee is 6 feet 3 inches tall, is morbidly obese (450 to 500 pounds), and has a high school education.

Employer manufactures electrical junction boxes and railroad crossing boxes. Employee’s job responsibility was to fabricate metal electrical boxes via metal inert gas welding and stick welding followed by sanding the finished product with a 20-pound grinder. Employee’s repetitive work averaged fabrications of between 300 and 400 metal boxes per day. The boxes ranged in weight from 10 to 500 pounds.

The Last (i.e., Primary) Injury

Sometime around April 2015, Employee started having problems with his upper extremities, complaining of bilateral hand problems and shooting pains in his arms, shoulders, and neck area. Employer sent Employee to Dr. Thomas Winston, who concluded that Employee’s bilateral upper extremity complaints were work-related and provided medical treatment to Employee, including an injection into Employee’s right shoulder. Employee was later seen by Dr. Jerry Meyer, Dr. Michael Waldschmidt, and Dr. William Hopkins, all of whom agreed that Employee’s bilateral carpal tunnel entrapment upper extremity injuries, at maximum medical improvement, were such that Employee’s medical restrictions were: no overhead work; not lift over 20 pounds; not perform repetitive tasks with his arms; not use equipment that vibrates; not

stand or walk more than twenty minutes at a time; and not sit or stand continuously for more than an hour at a time.

Employee settled his permanent partial disability claim for his bilateral upper extremity injuries with Employer for an impairment rating of 27.5% to the body as a whole (110 weeks of permanent partial disability).

Preexisting Medical Conditions

Employee suffered from: morbid obesity for many years prior to his primary injury; carpal tunnel syndrome requiring surgery in 1989; thyroid issues requiring surgery in 1996; hypothyroidism and hypertension requiring treatment in 2010-11; transient ischemic attack in 2011; hemorrhoids condition requiring surgery in 2011; left leg laceration during a hunting trip requiring topical treatment for a stasis ulcer in 2012-13 and again in February of 2015; and left shoulder rotator cuff injury requiring repair in 2014.

All of this said, the most significant of Employee's preexisting medical conditions (and relevant to our discussion today) is his bilateral lower extremity condition in which he initially began exhibiting symptoms of radiating pain down both legs and into his swollen ankles in 2005 secondary to morbid obesity and venous varicosities in association with obesity. But, given the work responsibilities performed for Employer over the years,¹ Employee's bilateral lower extremity condition continued to deteriorate prior to Employee's primary injury, although Employee worked continuously for Employer until his upper extremity injuries in 2015. Ultimately, Dr. Hopkins separated out non-work-incurred versus work-incurred percentages of

¹ Employer sometimes accommodated Employee by allowing him to sit to perform his job tasks and, at other times during his work history, more standing was required of Employee. Employee's bilateral lower extremity condition was unquestionably a hindrance to employment; however, Employee was never unable to perform the responsibilities of his job with Employer due to his bilateral *lower* extremity condition. It was not until the subsequent bilateral *upper* extremity condition (*i.e.*, primary injury) that Employee became unemployable in the open labor market.

preexisting disability to Employee's bilateral lower extremities and opined that Employee's preexisting "cumulative work-incurred injuries" to his bilateral lower extremities were 30% to each leg (rated at the 160-week level—or 48 weeks per leg) plus a 15% loading factor applied bilaterally (an additional 12 weeks per leg).

Permanent Total Disability

Given the testimony of multiple vocational experts as well as the uncontradicted expert medical opinion of Dr. Hopkins, there is no dispute that Employee is permanently and totally disabled.

Dr. Hopkins ultimately concluded that the combination of Employee's preexisting and work-incurred bilateral lower extremity disability when combined with his primary bilateral upper extremity injury and resulting permanent partial disability resulted in Employee's permanent total disability ("PTD"). Of import, there was no other medical expert besides Dr. Hopkins who opined on the cause of Employee's PTD.

The Administrative Law Judge ("ALJ") and Commission both acknowledged Employee's PTD, but both administrative tribunals also concluded that the Treasurer of the State of Missouri - Custodian of the Second Injury Fund ("SIF") was not liable for the payment of PTD compensatory payments to Employee, albeit for different reasons. But, the "differences" are of consequence to our discussion today.

ALJ's Conclusion

The ALJ's findings in his ruling essentially concluded that he did not find Dr. Hopkins's opinion to be credible as to the medical cause of Employee's PTD and, hence, expressly concluded that "[Employee] has not met his burden of proof to establish Second Injury Fund liability under

the current pronouncement of Chapter 287.” Employee appealed the ALJ’s ruling to the Commission.

Commission’s Conclusion

With regard to the ALJ’s rationale *rejecting* Dr. Hopkins’s expert medical opinion as to the cause of Employee’s permanent and total disability, the Commission expressly stated: “We disavow these findings.”

In fact, the Commission expressly noted in its Final Award that the Employee had presented credible evidence “to establish Employee’s theory of the case.” In other words, the Commission found Dr. Hopkins’s expert medical opinion as to the cause of Employee’s PTD to be plausible and credible; however, a majority of the Commission’s three-member panel concluded that “it was equally likely that employee’s preexisting injuries (without the addition of the primary injury) resulted in employee’s permanent and total disability.”²

As this opinion discusses, there is a difference between concluding that the uncontradicted expert medical opinion testimony on causation is *not credible* versus *credible but equally likely* to another cause in which there is no expert medical testimony to support the Commission’s alternative theory of the case as to causation.

Further facts as relevant to our analysis are presented below.

Sufficiency-of-the-Evidence Challenge

In Employee’s point on appeal, Employee asserts a sufficiency-of-the-evidence challenge to the Commission’s Final Award.

² One of the three members of the Commission dissented with the majority’s Final Award arguing that, since the majority found Dr. Hopkins’s expert medical testimony on causation to be credible and reliable, the majority was *not* in a position to *ignore* it. We agree, at least to the extent that there is no other expert medical testimony on the topic of causation that supports the lay opinion reflected in the Commission’s Final Award.

Standard of Review

On appeal, we review the Commission's decision to ensure it is "supported by competent and substantial evidence." *White v. ConAgra Packaged Foods, LLC*, 535 S.W.3d 336, 338 (Mo. banc 2017) (quoting MO. CONST. art. V, § 18).

The Commission's decision will . . . be disturbed [only] if: (1) the Commission acted without or in excess of its powers; (2) the award was procured by fraud; (3) the facts found by the Commission do not support the award; or (4) there was not sufficient competent evidence in the record to warrant the making of the award.

Id.; see also *Cosby v. Treasurer*, 579 S.W.3d 202, 206 (Mo. banc 2019) (stating the same).

"We . . . review the findings and award of the Commission rather than those of the ALJ, to the extent that it departs from the ALJ's ruling." *Jefferson City Country Club v. Pace*, 500 S.W.3d 305, 311 (Mo. App. W.D. 2016) (quoting *Small v. Red Simpson, Inc.*, 484 S.W.3d 341, 344 (Mo. App. W.D. 2015)).

Upon review of the Commission's decision, we view the evidence objectively and not in the light most favorable to the decision of the Commission. Where a Commission's decision is based on its interpretation and application of the law, we review the Commission's conclusions of law and its decision de novo. However, we defer to the Commission's factual findings on issues such as the credibility of witnesses and the weight given to their testimony. This includes the Commission's evaluation of expert medical testimony. The Commission, as the finder of fact, is free to believe or disbelieve any evidence.

Treasurer of the State of Mo. v. Majors, 506 S.W.3d 348, 352 (Mo. App. W.D. 2016) (internal quotation marks omitted) (citations omitted).

Analysis

In Employee's sole point on appeal, Employee challenges the sufficiency of the evidence supporting the Commission's Final Award. Employee asserts that the issue determining SIF liability was one of causation, there was only one uncontradicted expert medical opinion on the topic of causation, the Commission first credited that expert medical opinion as plausible, but then

the Commission erroneously asserted its own lay opinion on the topic of causation to deny compensation to Employee in its Final Award and such error requires reversal. We agree.

Statutory Conditions for SIF Liability

In relevant part, Chapter 287 defines SIF liability for permanent and total disability benefits to an injured employee as follows:

Under [§ 287.220.3, RSMo. 2016], employees now must meet two conditions to make a compensable PTD claim. First, the employee must have *at least* one qualifying preexisting disability. § 287.220.3(2)(a). To qualify under the first condition, the preexisting disability must be medically documented, equal to at least 50 weeks of permanent partial disability, and meet one of the following criteria:

- (i) A direct result of active military duty in any branch of the United States Armed Forces; or
- (ii) A direct result of a compensable injury as defined in section 287.020; or
- (iii) Not a compensable injury, but such preexisting disability directly and significantly aggravates or accelerates the subsequent work-related injury and shall not include unrelated preexisting injuries or conditions that do not aggravate or accelerate the subsequent work-related injury; or
- (iv) A preexisting permanent partial disability of an extremity, loss of eyesight in one eye, or loss of hearing in one ear, when there is a subsequent compensable work-related injury as set forth in subparagraph b of the opposite extremity, loss of eyesight in the other eye, or loss of hearing in the other ear[.]

§ 287.220.3(2)(a)(i)-(iv). Second, the employee must show he “thereafter sustains a subsequent compensable work-related injury that, when combined with the preexisting disability . . . results in permanent total disability. . . .” § 287.220.3(2)(b). The “subsequent compensable work-related injury” is often referred to as the “primary injury.”

Treasurer v. Parker, 622 S.W.3d 178, 181 (Mo. banc 2021) (emphasis added).

Here, it is undisputed that Employee is permanently and totally disabled as defined under Chapter 287 of the Revised Statutes of Missouri. Further, the Commission has credited Dr. Hopkins's expert medical opinion as to the medically documented preexisting disability equaling a minimum of fifty weeks of permanent partial disability attributable to a work-related injury as Dr. Hopkins's attributed a total of 120 weeks of permanent partial disability to Employee's preexisting work-related medical condition of bilateral lower extremity injuries. And, there is no dispute that Employee sustained a "subsequent compensable work-related injury" in 2015 (*i.e.*, the last, or primary, injury) of bilateral upper extremity injuries in which 110 weeks of permanent partial disability is attributable to this primary injury.

Most importantly, however, is that the Commission concedes in its Final Award that Dr. Hopkins's expert medical opinion as to the cause of Employee's PTD is one of two "likely" causes and, consequently, the Commission also concludes that the Employee has thus presented substantial evidence "to establish [Employee's] theory of the case," namely that "the combination of employee's preexisting [bilateral lower extremity] injuries and the primary injury [bilateral upper extremity injuries] resulted in employee's permanent and total disability." Accepting this conclusion of the Commission, this uncontroverted evidence³ constitutes substantial evidence necessitating SIF liability for Employee's PTD.

³ Employee argues that once this expert medical evidence on causation is presented by the Employee, it is incumbent upon the SIF to present contrary expert medical testimony to rebut Employee's expert medical evidence if it chooses to contest Employee's evidence. We disagree. As the finder of fact, we defer to the Commission on its credibility determinations as to all witnesses, including expert medical testimony. *Treasurer of the State of Mo. v. Majors*, 506 S.W.3d 348, 352 (Mo. App. W.D. 2016). And, "[t]he Commission, as the finder of fact, is free to believe or disbelieve *any* evidence." *Id.* (emphasis added) (internal quotation marks omitted). And, though the SIF did not present any evidence in the administrative proceedings below, because the SIF was not the party bearing the burden of proving SIF liability, it was not obligated to present evidence. For, where the Commission finds that *any or all* of Employee's evidence is not credible, this lends credence to the notion that "no evidence is needed to find against the party who bore the burden of proof or to uphold that decision on appeal." *Beaman v. Lowe's Home Ctrs., Inc.*, 601 S.W.3d 330, 331 (Mo. App. S.D. 2020); *see also Michael v. Treasurer*, 334 S.W.3d 654, 662 (Mo. App. S.D. 2011) (stating that the SIF has no obligation to present conflicting evidence on an Employee's claim for permanent and total disability benefits, and, instead, it is Employee's obligation to prove the Employee's claim via credible evidence); *Dunn v. Treasurer of Mo.*, 272 S.W.3d 267, 275 (Mo. App. E.D. 2008) (stating the same). While it may be risky

Herein lies the defect in the Commission's ultimate conclusion that, albeit Dr. Hopkins's testimony on causation is credible and a "likely" expert medical explanation for the cause of Employee's PTD, "[i]t was equally likely that employee's preexisting injuries (without the addition of the primary injury) resulted in employee's permanent and total disability." This conclusion as to causation is unsupported by any expert medical testimony and is, instead, simply the lay conclusion of two of three members of the Commission; accordingly, it is nothing more than conjecture and speculation and cannot, as a matter of law, constitute substantial evidence to support the Commission's Final Award.

Causation Determination Requires Expert Medical Testimony

"The question of causation is one for medical testimony, without which a finding for [or against] claimant would be based upon mere conjecture and speculation and not on substantial evidence.'" *Van Winkle v. Lewellens Pro. Cleaning*, 258 S.W.3d 889, 897 (Mo. App. W.D. 2008) (quoting *Elliott v. Kansas City, Mo., Sch. Dist.*, 71 S.W.3d 652, 658 (Mo. App. W.D. 2002)). "Accordingly, where expert medical testimony is presented, 'logic and common sense,' or an ALJ's [or the Commission's] personal views of what is 'unnatural,' cannot provide a sufficient basis to decide the causation question" *Id.* at 897-98.

Though "we acknowledge that the Commission may decide a case 'upon its disbelief of uncontradicted and unimpeached testimony,'" *Angus v. Second Injury Fund*, 328 S.W.3d 294, 300 (Mo. App. W.D. 2010) (quoting *Alexander v. D.L. Sitton Motor Lines*, 851 S.W.2d 525, 527 (Mo. banc 1993)), once the Commission has found uncontradicted and unimpeached expert medical testimony to be credible, "[t]he Commission may not substitute [its] personal opinion on the question of medical causation of [an injury] for the uncontradicted testimony of a qualified medical

strategy for the SIF to choose not to present evidence that is contrary to the evidence presented by the Employee (as this case demonstrates), it is not obligatory for the SIF to present its own evidence in a workers' compensation claim.

expert.”” *Id.* (quoting *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994) (overruled in part on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 app. (Mo. banc 2003))).

Likewise, “[t]he Commission is free to choose between conflicting expert medical opinions” *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 49 (Mo. App. W.D. 2007). In that scenario, as we have said before, “when the evidence before the Commission would *warrant* either of two opposed findings, [we are] bound by the [Commission’s] determination, and it is irrelevant that there is supportive evidence for the contrary finding.” *Majors*, 506 S.W.3d at 352 (emphasis added) (internal quotation marks omitted). Here, however, there was only one credible expert medical opinion on the issue of causation that could “warrant” a finding on causation—namely, Dr. Hopkins’s testimony.

In the present workers’ compensation claim, there is only one qualified expert medical opinion on the issue of causation—Dr. Hopkins’s testimony that Employee’s qualified preexisting medically documented disability (bilateral lower extremity disability), when combined with the primary injury (bilateral upper extremity disability), has resulted in Employee’s PTD.

Though the Commission could have adopted the ALJ’s finding that Dr. Hopkins’s expert medical opinion on causation was not credible or believable, it expressly chose not to do so, stating instead in its Final Award that “we disavow these findings” by the ALJ. In so doing, the Commission credited the testimony of Dr. Hopkins and necessarily concluded that Dr. Hopkins’s opinion on causation was “equally likely” as the Commission’s contrary conclusion—that “employee’s preexisting injuries [alone] resulted in employee’s permanent and total disability.” The Commission’s causation opinion is not, however, supported by any expert medical opinion and is, instead, nothing more than the Commission’s personal opinion. Accordingly, the

Commission's Final Award on the issue of causation is not supported by sufficient competent evidence to warrant the making of the Final Award and it must be reversed.

Once it is determined that the Commission's decision, as a matter of law, is not supported by sufficient competent evidence, an appellate court has discretion to modify, reverse or remand for rehearing, or set aside the Commission's decision. § 287.495.1. Generally, when there is no sufficient competent evidence to support a particular finding, the appellate court reverses the Commission's finding and remands the case for entry of an appropriate decision consistent with the evidence. In limited cases where the injury or ailment and the medical testimony appear to be in an unusual and rather obscure field where the parties did not have the opportunity to fully develop the evidence, the case will be remanded so that additional evidence may be produced on an issue if it is available. Here it appears both the employer and the employee had a full opportunity to develop and present such evidence as was available regarding medical causation of claimant's condition. There is nothing unusual or obscure about cervical spine injury. No additional hearing on causation is required.

Wright, 887 S.W.2d at 600-01 (citations omitted) (internal quotation marks omitted).

Similarly, here, because we have concluded that the Commission's Final Award, as a matter of law, is not supported by sufficient competent evidence, we reverse the Commission's Final Award as it relates to its finding on the issue of medical causation for Employee's PTD. Both the Employee and SIF had a full opportunity to develop and present such evidence as was available regarding medical causation of Employee's PTD. There is nothing unusual or obscure about the lower and upper extremity medical conditions Employee suffers from; hence, no additional hearing on medical causation is required. Instead, upon remand, the Commission is directed to issue proper findings that as a consequence of Employee's qualified preexisting injuries to his lower extremities (120 weeks of permanent partial disability), when combined with his primary injury (110 weeks of permanent partial disability), have resulted in a combination of which that has rendered Employee permanently and totally disabled.

Consistent with *Wright*, the Commission's Final Award is reversed and the case remanded to the Commission for entry of proper findings on the medical causation of Employee's injuries as

itemized above and consistent with the uncontradicted expert medical testimony and this opinion. To the extent that there remain any other unresolved issues in Employee's claim, they are for determination by the Commission.

/s/ *Mark D. Pfeiffer*

Mark D. Pfeiffer, Judge

Edward R. Ardini, Jr., Presiding Judge, and W. Douglas Thomson, Judge, concur.