**Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.**

FILED
Nov 04 2009, 9:31 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

**DANIEL J. MCGLONE**
McGlone Law
Terre Haute, Indiana

ATTORNEY FOR APPELLEE:

**CHRISTOPHER H. CROSS**
Skiles Detrude
Indianapolis, Indiana

# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| ANNETTE BAKER, | ) | |
| | ) | |
| Appellant-Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 93A02-0904-EX-307 |
| | ) | |
| HEARTLAND FOOD CORPORATION, | ) | |
| | ) | |
| Appellee-Defendant. | ) | |

APPEAL FROM THE INDIANA WORKER'S COMPENSATION BOARD
Application No. C-189102

**November 4, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## STATEMENT OF THE CASE

Annette Baker filed an application for adjustment of claim with the Worker's Compensation Board of Indiana (the "Board") against her employer, Heartland Food Corporation ("Heartland"). A Single Hearing Judge denied her claim, concluding that Baker had not established that her personal injury arose out of and in the course of her employment. Baker petitioned the full Board, which affirmed the Single Hearing Judge's decision following a hearing. Baker presents two restated issues for our review:

1. Whether the Board abused its discretion when it denied Baker's petition to introduce new evidence at the hearing before the full Board.

2. Whether the Board erred when it denied her application for adjustment of claim.

We affirm.[1]

## FACTS AND PROCEDURAL HISTORY

Heartland owns a Burger King restaurant in Terre Haute. At approximately 9:15 a.m. on August 3, 2007, Baker, an employee at the restaurant, began stocking her work station with hamburger meat patties and hamburger buns. At one point, she bent forward and she felt and heard a "pop" in her spine. Baker immediately felt severe pain in her lower back, and she sought emergency medical treatment at Union Hospital.

[1] On August 28, 2009, we handed down an opinion for publication in this matter. Prior to certification of that opinion, however, we withdrew and vacated that decision. This memorandum decision fully supercedes and replaces the prior opinion of this court, and the parties will have the opportunity to petition this court for rehearing or petition our supreme court for transfer, if they so choose, in accordance with our appellate rules commencing on the date of handdown for this memorandum decision.

Baker was diagnosed with a massive herniated disc at L2-3 bilaterally, and she underwent two surgeries. Baker spent approximately three weeks in the hospital in recovery. After she returned home, Baker could not resume her normal physical activities, and she did not return to work.

Baker's medical history includes a herniated disc at L5-S1, requiring surgery, in 1996 or 1997. And Baker has suffered "chronic back problems." Appellant's App. at 91. But Baker had never complained of back pain at work prior to August 3, 2007, and she was active. Baker's hobbies at the time of the injury at Burger King included gardening and horseback riding.

Baker initially denied that the herniated disc was work-related, but she subsequently filed an application for adjustment of claim alleging that her injury was work-related. Heartland maintained that her injury was due to "an idiopathic relapse of a pre-existing condition[.]" Transcript at 69. Following a hearing, the Single Hearing Judge denied Baker's claim, finding and concluding as follows:

> 1. Defendant employed Plaintiff as of August 3, 2007.
>
> 2. Plaintiff was admitted to Union Hospital on August 3, 2007[,] and seen in triage at 10:37 a.m. According to Union Hospital's records, Plaintiff bent over and felt a pop in her lower back approximately 20 minutes prior to admission.
>
> 3. The records indicate that Plaintiff reported "I popped another disc. I really did it this time, it hurts and burns the same as before but higher. I can't lift my right leg, and I'm seeing dots. I only bent over, I was not lifting." The records indicate that Plaintiff's medical history is significant for pre-diabetic care, a previous disc herniation at another level of the lumbar spine and chronic back problems.

4. A note dated August 15, 2007[,] states "She has also had treatment by Dr. Bailey and sometimes has to use a cane for walking. She remained active, even with chronic back pain."

5. A note authored by Tyrone Powell, Ph.D.[,] dated August 30, 2007[,] states ". . . she was at work at Burger King when she bent over to pick up a hamburger on the floor."

6. Plaintiff filed her Application for Adjustment of Claim on October 15, 2007. On her Application Plaintiff alleged that she was getting food out of a freezer, bent over to open a bun bag to get a bun and felt a terrible pain in her back.

7. On March 6, 2008[,] Plaintiff filed her Petition for Emergency Hearing to Determine Compensability and Establish Temporary Total Disability and Medical Payments.

8. At [a] hearing on May 12, 2008, Plaintiff testified that she was helping to make a large order of food and that she was attempting to free a plastic bun tray from a metal tray rack when she experienced the onset of severe pain. Plaintiff testified that there was previous damage to the metal rack that caused the plastic bun tray to become stuck in the rack.

9. At [a] hearing on May 12, 2008, Defendant's representative testified that Plaintiff told her over the telephone during her hospital stay and in person that Plaintiff did not wish to complete an accident report for purposes of securing worker's compensation.

10. At [a] hearing on May 12, 2008[,] Plaintiff testified that she did not have a good recollection of anything that occurred after she felt the onset of pain and that she did not recall speaking with Defendant's representative during her hospitalization. Plaintiff testified that she had experienced a bad reaction to morphine during her hospitalization. Plaintiff's mother testified that Plaintiff experienced hallucinations during her hospital stay and that Plaintiff said things that were out of character.

11. According to the medical records, Plaintiff presented her medical providers with histories at various times on and after August 3, 2007. While the records suggest that Plaintiff did have a reaction to morphine for part of the period of treatment, she also provided histories regarding her condition before and after the period that she was treated with morphine. The statement made most contemporaneously with the injury on August 3, 2007[,] indicates that Plaintiff simply bent over and felt the onset of pain.

> 12. Although the parties provided the Board with a large stack of medical records, the parties' exhibits do not contain specific medical reporting or testimony addressing the mechanism of Plaintiff's injury or the issue of causation for purposes of the Worker's Compensation Act.
>
> 13. The testimony and exhibits presented at [the] hearing on May 12, 2008[,] do not establish by a preponderance of the evidence that Plaintiff sustained personal injury by accident arising out of and in the course of her employment as alleged.

Appellant's App. at 8-9. Baker appealed that decision to the full Board, which adopted the Single Hearing Judge's decision. This appeal ensued.

## DISCUSSION AND DECISION

### Standard of Review

We have previously explained the applicable standard of review as follows:

> In challenging the Board's decision, [the employee] confronts a strong standard of review. This court is bound by the factual determinations of the Board and may not disturb them unless the evidence is undisputed and leads inescapably to a contrary conclusion. We must disregard all evidence unfavorable to the decision and must consider only the evidence and reasonable inferences therefrom which support the Board's findings. This court neither reweighs the evidence nor judges the witness' credibility, as these are functions of the Board. Whether an injury arises out of and in the course of employment is a question of fact to be determined by the Board. If the Board reaches a legitimate conclusion from the evidential facts, the appellate court cannot disturb that conclusion although it might prefer another conclusion equally legitimate.

Kovatch v. A.M. General, 679 N.E.2d 940 (Ind. Ct. App. 1997) (citations omitted), trans. denied.

### Issue One: New Evidence

Baker first contends that the Board abused its discretion when it denied her petition to submit new evidence at the hearing before the full Board. When the Board is reviewing a single hearing member's determination, the decision to deny or allow the

introduction of additional evidence is a matter within the Board's sound discretion. Hancock v. Indiana School for the Blind, 651 N.E.2d 342, 343 (Ind. Ct. App. 1995), trans. denied. This court will not disturb the Board's ruling in this regard unless there is a clear abuse of discretion. Id. Further, this court has held that the failure to make an offer to prove with regard to the proffered evidence results in waiver of the issue. Wilson v. Betz, 128 Ind. App. 189, 146 N.E.2d 570, 573 (1957).

Here, Baker did not present expert medical testimony during the hearing before the single hearing member.[2] She subsequently obtained the deposition of her surgeon, Dr. George Wilson, Jr., and sought to introduce that testimony to the full Board. In her petition to introduce new evidence, Baker maintained that she had been unable to obtain Dr. Wilson's deposition in time for the hearing before the Single Hearing Judge because of scheduling conflicts. But Baker did not make an offer to prove with respect to the deposition during the hearing before the full Board.[3] Under Wilson, Baker has waived the issue for our review. 146 N.E.2d at 573. Waiver notwithstanding, Baker has not demonstrated that the Board clearly abused its discretion when it denied her petition to introduce new evidence. Baker's explanation for her failure to obtain the deposition in a more timely manner is unpersuasive. Further, in lieu of the deposition testimony, Baker

[2] Baker's relevant medical records were submitted as evidence, but those records did not include any opinion regarding the etiology of her injury.

[3] The record on appeal does not include a transcript of the hearing before the full Board. Nevertheless, Baker does not dispute Heartland's assertion that she did not make an offer to prove with respect to Dr. Wilson's deposition.

could have obtained Dr. Wilson's written report under Indiana Code Section 22-3-3-6(d). Baker cannot prevail on this issue.[4]

**Issue Two: Causal Nexus**

Here, Baker contends that the Board erred when it concluded that she had not submitted evidence sufficient to support an award in her favor. The Worker's Compensation Act authorizes the payment of compensation to employees for "personal injury or death by accident arising out of and in the course of the employment." Ind. Code § 22-3-2-2(a). An injury "arises out of" employment when a causal nexus exists between the injury sustained and the duties or services performed by the injured employee. Outlaw v. Erbrich Prods. Co., Inc., 742 N.E.2d 526, 530 (Ind. Ct. App. 2001). An accident occurs "in the course of employment" when it takes place within the period of employment, at a place where the employee may reasonably be, and while the employee is fulfilling the duties of employment or while engaged in doing something incidental thereto. Id. Both requirements must be met before compensation is awarded, and neither alone is sufficient. Conway v. Sch. City of East Chicago, 734 N.E.2d 594, 598 (Ind. Ct. App. 2000), trans. denied. The person who seeks Worker's Compensation benefits bears the burden of proving both elements. Id.

[4] Again, the full Board adopted the Single Hearing Judge's findings and conclusions, and the Single Hearing Judge did not find Baker credible on the issue of what task she was doing at the time of injury. The evidence supports the Single Hearing Judge's findings that Baker initially stated that she was merely bent over and not lifting anything, but subsequently stated that she was wrestling with a bun tray. Dr. Wilson's conclusion that Baker's disc herniation was work-related was based upon his understanding that Baker was "lifting" or "pulling" something at the time of injury. See Appellant's App. at 175, 177. Accordingly, even if the Board had admitted Dr. Wilson's deposition into evidence, we cannot say as a matter of law that the Board would have reached a different conclusion regarding her ineligibility for benefits.

Here, the undisputed evidence supports a determination that Baker's injury occurred "in the course of her employment," since it occurred within the period of employment while she was fulfilling her duties. The dispute arises with regard to the second element, namely, whether the injury "arose out of" her employment. The Board concluded that Baker had not proven a causal nexus between her injury and her duties.

With respect to the causal nexus issue, our Supreme Court has stated that "[the] nexus is established when a reasonably prudent person considers the injury to be born out of a risk incidental to the employment, or when the facts indicate a connection between the injury and the circumstances under which the employment occurs." Wine-Settergren v. Lamey, 716 N.E.2d 381, 389 (Ind. 1999). Further, it is clear that the employee bears the burden of proof throughout worker's compensation proceedings, including proof of the causal nexus between an employee's injury and his duties. See Pavese v. Cleaning Solutions, 894 N.E.2d 570, 576 (Ind. Ct. App. 2008).

First, Baker contends that the Board erred when it "found that as a matter of law, Baker was required to present expert medical evidence on causation." Brief of Appellant at 15. But our review of the Board's findings does not reveal that the Board made any such finding. Instead, the Board found and concluded in relevant part as follows:

> 12. Although the parties provided the Board with a large stack of medical records, the parties' exhibits do not contain specific medical reporting or testimony addressing the mechanism of Plaintiff's injury or the issue of causation for purposes of the Worker's Compensation Act.
>
> 13. The testimony and exhibits presented at [the] hearing on May 12, 2008 do not establish by a preponderance of the evidence that Plaintiff sustained personal injury by accident arising out of and in the course of her employment as alleged.

Appellant's App. at 9. We do not read those conclusions to require medical testimony, but merely as a finding that no medical testimony "addressing the mechanism" of injury was submitted and a conclusion that the evidence, overall, was insufficient to satisfy Baker's burden of proof.

Regardless, in support of her contention that expert medical testimony was not required in her case, Baker cites to Foddrill v. Crane, 894 N.E.2d 1070, 1077 (Ind. Ct. App. 2008), trans. denied. In Foddrill, a personal injury negligence case, this court, quoting Daub v. Daub, 629 N.E.2d 873, 877-78 (Ind. Ct. App. 1994), trans. denied, observed:

> When an injury is objective in nature, the plaintiff is competent to testify as to the injury and such testimony may be sufficient for the jury to render a verdict without expert medical testimony. Ordinarily, however, the question of the causal connection between a permanent condition, an injury and a pre-existing affliction or condition is a complicated medical question. When the issue of cause is not within the understanding of a layperson, testimony of an expert witness on the issue is necessary. An expert, who has the ability to apply principles of science to the facts, has the power to draw inferences from the facts which a lay witness or jury would be incompetent to draw.

(Emphasis added.)

Baker asserts that, like the plaintiff's neck injury in Foddrill, her herniated disc is the result of "flexion and strain applied to the spine" and is "common enough" to fall within the understanding of a layperson. Brief of Appellant at 17. We cannot agree. Baker's medical history includes a previous disc herniation; she fell off of a horse weeks prior to the herniation in the instant case; and the Board found that she was not lifting

anything at the time of injury.[5] Under the circumstances, we cannot say that the mechanism of her injury is within the understanding of a layperson.

Next, Baker contends that any doubts regarding causation should be resolved in her favor. In particular, Baker maintains that "if the employee has submitted evidence supporting favorable inferences and supporting an award to her, then she should receive an award unless there is overwhelming evidence to the contrary." Brief of Appellant at 12. For support, Baker cites to our Supreme Court's opinion in Talas v. Correct Piping Co., 435 N.E.2d 22, 28 (Ind. 1982), where the Court stated:

> It is the longstanding rule of this jurisdiction that terms contained in our Workmen's Compensation Act are to be liberally construed so as to effectuate the humane purposes of the Act; doubts in the application of terms are to be resolved in favor of the employee, for the passage of the Act was designed to shift the economic burden of a work-related injury from the injured employee to the industry and ultimately, to the consuming public.

Baker's reliance on Talas is misplaced. In essence, Baker asks that we reweigh the evidence on appeal, which we will not do. We are not presented with a question of the "application of terms" of the Act, as set out in Talas. Instead, we are reviewing the Board's determination that Baker failed to meet her burden of proof.

Our review of the evidence does not provide grounds for reversal. Again, this court is bound by the factual determinations of the Board and may not disturb them unless the evidence is undisputed and leads inescapably to a contrary conclusion. Baker presented evidence that she was bent over, wrestling with a bun tray, when she felt a

[5] Baker gave different versions of what she was doing at the time of the injury. She told the emergency room staff that she was bending forward, but not lifting anything. In her Application, she stated that she was opening a bag of buns out of the freezer. And she subsequently testified that she was struggling to free a tray stuck in a metal tray rack.

popping sensation and immediate pain in her back. Baker did not present any evidence establishing a causal nexus between her work-related activity and the herniated disc. Whether the herniation was caused by her work-related activity or was due to an underlying condition, as Heartland alleged, has not been resolved by the evidence. Without any such evidence, we cannot say that the Board erred when it determined that her injury was not sustained by accident arising out of and in the course of her employment.

Affirmed.

KIRSCH, J. and BARNES, J., concur.