RENDERED: May 7, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001465-WC

BARBARA CLEAVER — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. 97-00969

FAZOLI'S; LLOYD EDENS, ADMINISTRATIVE LAW JUDGE; SPECIAL FUND; BEN CHANDLER, ATTORNEY GENERAL; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: KNOPF, KNOX, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Barbara Cleaver (Cleaver) petitions for a review of an opinion of the Workers' Compensation Board (Board) affirming the decision of the Administrative Law Judge (ALJ). The issue on appeal is whether the ALJ's decision to deny Cleaver's motion to appoint a medical examiner pursuant to KRS 342.315 was erroneous and, in the alternative, whether or not KRS 342.315 is unconstitutional.

Cleaver is a 41-year-old woman who was employed by Fazoli's as a fast-food worker. While at work on December 11, 1995, Cleaver fell and later complained of injury to her back,

neck, shoulder, ankle, hip, and left side. She saw Dr. Mathis that night after completing her shift. She was off from work for two days, then returned, and continued to work for Fazoli's until April 1996. In April 1996, her left arm gave way while lifting approximately ten pounds of pasta. Cleaver saw Dr. Mathis again and this time she did not return to work until August 1996. Subsequently, Cleaver returned to work for Fazoli's until March 1997 when she was terminated for being unable to perform her job duties.

According to Dr. Mathis, Cleaver suffered from cervical strain, strain of the left shoulder, and thoracolumbar spine strain with myofascitis. He also stated that Cleaver suffered from a 10% loss of range of motion in the thoracolumbar spine. Dr. Hargadon was hired by Fazoli's. He examined Cleaver and noted symptom exaggeration and magnification and therefore stated that he was unable to make an impairment rating.

The Hon. Ronald E. Johnson, Arbitrator, dismissed Cleaver's claim, relying on Dr. Hargadon's opinion that there was no permanent injury. Subsequently, Cleaver sought de novo review before an ALJ, pursuant to KRS 342.275(1). According to the ALJ's opinion dated January 28, 1998, the ALJ found that Cleaver sustained a work-related injury, but that she did not have a permanent impairment or an occupational disability. She was awarded temporary total disability benefits and medical and hospital expenses. The ALJ overruled Cleaver's motion to appoint a medical evaluator pursuant to KRS 342.315. The statute states that the medical evaluator <u>may</u> be appointed by the administrative

law judge "to make any necessary medical examination of the employee." However, the ALJ determined that "an examination by the university evaluator would not be of substantial benefit in the claim . . ." The ALJ determined that the testimony of Cleaver's physician, Dr. Mathis, and the testimony of Dr. Hargadon, hired by Fazoli's, was sufficient.

On appeal, Cleaver argues that a medical examiner should have been appointed, pursuant to KRS 342.315. Dr. Mathis stated that he was unfamiliar with the AMA guidelines and, therefore, could not give an impairment rating, and Dr. Hargadon refused to rate her because he believed that this was a case of symptom magnification.

KRS 342.0015 provides:

> Procedural provisions of 1996 (1st Extra. Sess.) Ky. Acts ch. 1 shall apply to all claims irrespective of the date of injury or last exposure, including, but not exclusively, the mechanisms by which claims are decided and workers are referred for medical evaluations.

Therefore, KRS 342.315 applies to claims pending as of December 12, 1996, including this claim, even though the accident took place on December 11, 1995. Additionally, KRS 342.315(3) states that an administrative law judge may direct appointment of a medical evaluator to make any necessary medical examination of the employee. This statute uses the word "may" which is discretionary, while the words "shall" or "must" are mandatory. Clark v. Reihl, 313 Ky. 142, 230 S.W.2d 626 (1950); Starks v. Kentucky Health Facilities, Ky. App., 684 S.W.2d 5 (1984). In this case, it was within the ALJ's discretion to appoint or not

to appoint a medical examiner. The ALJ determined that Cleaver did not suffer from a permanent impairment or an occupational disability and, therefore, it was not necessary to appoint a medical examiner to determine a permanent impairment rating.

The Court of Appeals cannot substitute its judgment for that of the ALJ concerning the weight of the evidence or questions of fact. KRS 342.285(3). According to KRS 342.315, determining if a medical evaluator is needed to make any necessary medical examination is left to the discretion of the ALJ. The ALJ, as the finder of fact, and not the reviewing court, has the authority to determine the quality, character, and substance of the evidence presented. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). In this case, the ALJ decided that no more medical testimony was needed. We cannot say in addressing this issue that the ALJ "overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992).

Cleaver argues that, in the alternative, KRS 342.315 is unconstitutional. Pursuant to KRS 342.316, if it is determined that an individual has an occupational disease, a medical examiner shall be appointed. KRS 342.316 is mandatory, while KRS 342.315 is discretionary. Cleaver argues that this legislation discriminates unconstitutionally. Cleaver appears concerned that she did not receive a functional impairment rating consistent with the AMA guidelines. However, it must first be determined

that an individual has a permanent impairment caused by injury or occupational disease in order to receive a functional impairment rating. According to the ALJ's opinion, dated January 28, 1998, he stated:

> . . . in view of the Plaintiff's testimony, the records of Dr. Mathis and, to some extent, the finding of Dr. Hargadon in his June 27, 1997 examination, I am not persuaded the Plaintiff has suffered a permanent occupational disability. . ."

Additionally, the ALJ noted that Cleaver continued to work at various jobs after her termination from Fazoli's and that despite her complaints, she was currently working full-time in the shipping department of Essex, making more money than she had at Fazoli's. Based on the evidence and facts of this case, the ALJ determined that Cleaver did not have an occupational disability. Therefore, the absence of a functional impairment rating is not significant.

In dealing with a challenge to the constitutionality of an act of the General Assembly, we "necessarily begin with the strong presumption in favor of constitutionality and should so hold if possible." Brooks v. Island Creek Coal Co., Ky. App., 678 S.W.2d 791, 792 (1984). It has further been held that the constitutionality of a statute dealing with economic matters "will be upheld if its classification is not arbitrary, or if it is founded upon any substantial distinction suggesting the necessity or the propriety of such legislation." Kentucky Harlan Coal Co. v. Holmes, Ky., 872 S.W.2d 446, 455 (1994). In addition, "[a] statutory classification in the area of social welfare is not unconstitutionally arbitrary if it has a

legitimate objective and is rationally related to that objective." Estridge v. Stovall, Ky. App., 704 S.W.2d 653, 655 (1985). Estridge also states that due process or equal protection are violated "'only if the resultant classifications or deprivations of liberty rest on grounds wholly irrelevant to a reasonable state objective..'" Id., citing Kentucky Ass'n. of Chiropractors, Inc. v. Jefferson County Medical Society, Ky., 549 S.W.2d 817 (1977). Thus, appellate review of this issue will involve the use of the rational basis test.

KRS 342.316 deals with occupational diseases and what proof is necessary to file, as well as to prove, a claim. The proof necessary is mandatory per section 4.(b) of KRS 342.316. KRS 342.315 deals with appointments and procedures when an expert witness is needed, in both injury and disease cases. This statute has a different function (appointment of an expert witness, etc.) than KRS 342.316 (proof necessary for filing and proving a claim). KRS 342.315 does not cancel the requirements in KRS 342.316, but may supplement the proof. As a result, a person with an injury only may not be required to undergo university testing, etc., whereas all occupational disease claims do. There is a difference between injuries and diseases (KRS 342.001(1), (2), and (3)), and it may take different medical procedures to detect one over the other. The existence of an occupational disease or the degree thereof is usually more controversial than an occupational injury. The Court in Wright v. Hopwood Mining, Ky., 832 S.W.2d 884, 885 (1992) recognized the legislative intent in enacting KRS 342.316 was "to establish more

precise and more objective standards of proof. . . ." We cannot argue with that goal. Also, an employee's right to occupational disease benefits is purely statutory and does not fall under the ambit of Section 14 of the Kentucky Constitution. This distinction alone might justify different standards of proof.

Appellant also argues KRS 342.315 violates Section 59, Subsection 24, of the Kentucky Constitution which prohibits special legislation regulating labor, trade, mining, or manufacturing. This is such a broad objection that we can only refer the parties to the numerous annotations under this Section which allows classifications and different treatment of different classes as long as there is distinctive and natural reasons inducing and supporting the classifications. See Safety Bldg. Loan Co. v. Ecklar, 106 Ky. 115, 50 S.W. 50 (1899), overruled on other grounds, Linton v. Fulton Bldg. & Loan Ass'n., 262 Ky. 198, 90 S.W.2d 22 (1936); Walters v. Bindner, Ky., 435 S.W.2d 464 (1968); Dandrige v. Williams, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970). Furthermore, "those attacking the rationality of the legislative classification have the burden 'to negate every conceivable basis which might support it.'" F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 315, 113 S. Ct. 2096, 2102, 124 L. Ed. 2d 211, 222 (1993), quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364, 93 S. Ct. 1001, 1006, 35 L. Ed. 2d 351, 358 (1973). Consequently, we are of the opinion that KRS 342.315 is constitutional.

The decision of the Board is therefore affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, SPECIAL FUND:

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