RENDERED: June 22, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000153-WC

THE HON COMPANY/OWENSBORO PLANT — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-83508

RANDALL EUGENE WEDDING; SECRETARY OF LABOR CABINET;
ROBERT L. WHITTAKER, DIRECTOR OF SPECIAL FUND;
HON. DONNA H. TERRY, ADMINISTRATIVE LAW JUDGE;
HON. WALTER W. TURNER, COMMISSIONER,
DEPARTMENT OF WORKERS' CLAIMS; AND
WORKERS' COMPENSATION BOARD — APPELLEES

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

BEFORE: COMBS, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: The Hon Company has filed a petition for review of the opinion rendered by the Workers' Compensation Board on December 17, 1999, which ruled that the Administrative Law Judge's award of total occupational disability to the claimant, Randall Wedding, was supported by substantial evidence, and that Wedding gave his employer due and timely notice of all injuries. Having concluded that the Board has not "overlooked or misconstrued controlling statutes or precedents, or committed an

error in assessing the evidence so flagrant as to cause gross injustice[,]" we affirm.[1]

At the time of his injuries, Wedding was 47-years old with a tenth grade education. Prior to his employment with Hon's predecessor, Murphy Miller, Wedding worked as an auto glass installer and a restaurant dishwasher. He had no vocational training nor any specialized skills.

Wedding began his employment with Miller in 1967 as a sander. He also held positions with Miller or Hon in sewing and as a mill room worker prior to being assigned as an industrial upholsterer. Wedding also trained new employees pursuant to his designation as a Master Upholsterer. His job tasks included rapid, repetitive motions utilizing his upper body, pulling and twisting fabrics and the use of a screwdriver and tack hammer.

The ALJ summarized Wedding's medical history in her opinion and award as follows:

> In 1995, Wedding began to experience pain in his upper extremities and particularly complained of left elbow pain. He first missed work on December 3, 1996, and sought treatment from his family physician. In 1997, he began treatment with Dr. James E. Carothers, an orthopedic surgeon who diagnosed overuse osteoarthritis of the left elbow and bilateral ulnar neuropathies caused by repetitive use of the upper extremities at work. Dr. Carothers performed a diagnostic arthroscopy on Wedding's left elbow on September 4, 1997 wherein he attempted to remove osteophytes from the left elbow joint. On October 30, 1997, he performed a second left elbow surgery, an ulnohumeral arthroplasty. According to Dr. Carothers, Wedding reached maximum medical improvement

[1]Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

> as of February 20, 1998, and has a 22% permanent functional impairment to the body as a whole.
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> The records of Wedding's family physician, Dr. [Bill] Bryant, contain medical referrals for upper extremity problems, including a July 15, 1997 evaluation by Dr. Gerald Sims. Dr. Sims diagnosed generalized osteoarthritis in Wedding's hands and wrists "which are undoubtedly directly related to his constant repetitive work as an upholsterer." That diagnosis was communicated to Wedding on July 15, 1997 and Dr. Sims advised Wedding that the problems would progress with continuing repetitive injuries at work.
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> Hon presented testimony from Dr. Larry Laughlin, an orthopedic surgeon who performed an independent examination on November 10, 1998 and diagnosed status post resection of osteophytes in the left elbow and arousal of pre-existing degenerative changes. Dr. Laughlin assessed a 5% permanent functional impairment to the body as a whole of which half is attributable to arousal of pre-existing degenerative changes.
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> Wedding returned to work for Hon after the left upper extremity surgeries and continued working at light duty until February 5, 1998 when he testified that he simply could not even perform the available light duty jobs.

The ALJ heard evidence in this contested claim and found that Wedding "gave notice as soon as practicable after the symptoms other than his left elbow became apparent."[2] The ALJ further found that "[t]he last 22 years of [Wedding's] work life were spent as an upholsterer and none of the medical experts who testified herein would allow him to return to that type of constant repetitive work[;]" and "[a]fter careful consideration

[2]Hon has always acknowledged that Wedding gave due and timely notice of the injury to his left elbow.

of the factors set forth in Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968) and KRS 342.0011 as effective on the date of injury, . . . that Wedding is 100% occupational[ly] disabled."

Hon appealed to the Board on the issues of (1) "lack of notice", (2) "lack of substantial evidence to support a finding of a total disability" and (3) "the applicability of KRS 342.730(4)."[3] The Board affirmed the ALJ and noted that the ALJ "possessed the discretion to believe testimony from Wedding that he informed his bosses about the pain and debilitating condition he was experiencing, not only with his left elbow but with both wrists and eventually his right arm. No contradictory evidence was offered by Hon . . . to refute this evidence from Wedding in connection with notice." The Board further held that "the ALJ relied on substantial evidence in her determination that Wedding suffers total occupational disability." This petition for review followed.

Since the ALJ, as fact-finder, found in favor of Wedding, who was the party with the burden of proof, the standard of review on appeal is whether there is substantial evidence in the record to support the ALJ's findings.[4] "Substantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable

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[3]Hon was successful on this issue concerning "tier down" provisions in its appeal before the Board, but for some unknown reason it has raised the same issue in its brief before this Court. Since Wedding has not appealed his loss on this issue, we will not address it.

[4]Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735, 736 (1984).

[people]."[5] Western Baptist provides that "[t]he function of further review of the [Workers' Compensation Board] in the Court of Appeals is to correct the Board only where the [] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice."[6]

Hon first argues that the ALJ's finding that Wedding gave it timely notice of all of his injuries was not supported by substantial evidence. KRS[7] 342.185 sets forth the requirements for giving notice of a work-related injury:

> [N]o proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof. . . .

The record in the case sub judice reveals that Wedding testified before the ALJ that after his left elbow injury became apparent he obtained medical treatment. He further testified that when he began to experience pain in both arms and wrists, he obtained medical treatment, as well as advising Parvin Phillips, Hon's safety director, of the pain, but explained that Phillips "didn't really listen."

It is well-established that "the finder of fact, and not the reviewing court, has the authority to determine the

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[5]Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367, 369 (1971).

[6]Western Baptist, supra at 687-88.

[7]Kentucky Revised Statutes.

quality, character and substance of the evidence,"[8] and that the finder of fact has "the right to believe part of the evidence and disbelieve other parts of the evidence. . . ."[9] KRS 342.185 does not require a certain time frame in which notice must be given. "What is 'as soon as practicable' must be determined by the ALJ who considers the specific facts and circumstances on a case by case basis."[10] We agree with the Board that substantial evidence existed to support the ALJ's finding that Wedding gave timely notice to Hon of his injuries.

Hon also argues that the ALJ's finding that Wedding sustained a total occupational disability is not supported by substantial evidence. We agree with the Board's sound reasoning on this issue and adopt the following relevant discussion from its opinion:

> While both Hon and the Special Fund argue that the evidence fails to support a finding of total occupational disability, we disagree. The ALJ was bound by the law as it existed prior to December 12, 1996. At that time, while medical evidence was probative on the issue of occupational disability, it was not determinative. At that time, it was the ALJ's function to look at the totality of circumstances of Wedding's situation and all of the factors enumerated in KRS 342.0011(11) and Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968) in making a determination of occupational disability. Seventh Street Road Tobacco Warehouse v. Stillwell, Ky., 550

[8]Paramount Foods v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985).

[9]Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977).

[10]Martin County Coal Corp. v. Preece, Ky.App., 924 S.W.2d 840, 841 (1996).

S.W.2d 469 (1976); Winn-Dixie Louisville, Inc. v. Watson, Ky., 473 S.W.2d 148 (1971).

> While a different Administrative Law Judge might have reached a different conclusion as to Wedding's degree of occupational disability, the law does not mandate that a greater or lesser degree of occupational disability be found. Miller's Lane Concrete, Inc. v. Dennis, Ky.App., 599 S.W.2d 464 (1980).
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> Even though the acting Arbitrator had previously determined that Wedding was only 50% occupationally disabled, the moment that a request for a de novo hearing was filed before an Administrative Law Judge, the benefit review determination issue by the Arbitrator lost all legal import and ceased to exist. See, KRS 342.275; 803 KAR 25:010, § 12; [citation omitted].
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> This Board may not substitute its judgment for that of the ALJ as to questions of fact. KRS 342.285(1). Moreover, where, as here, the evidence is conflicting on the issue of occupational disability, the ALJ is given the sole responsibility by the Legislature and the Courts to determine the weight and credibility of the evidence, and may reject or accept any evidence, including evidence from the same witness. Caudill, [supra]; Codell Constr. v. Dixon, Ky., 478 S.W.2d 703 (1972).

We hold that since the ALJ's finding that Wedding was totally occupationally disabled was supported by substantial evidence, it was beyond the authority of the Board and it is beyond the authority of this Court to alter this finding by the ALJ.[11]

Accordingly, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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[11]Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

BRIEF FOR APPELLANT:

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