

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000106-WC

HUNTINGTON BANKS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-68584

EARLEEN HAYNES; LLOYD R. EDENS,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUDGEL, Chief Judge; COMBS and JOHNSON, Judges.

COMBS, JUDGE: Huntington Banks ("Huntington") appeals from a decision of the Workers' Compensation Board ("Board") affirming an opinion, order, and award rendered by the Hon. Lloyd R. Edens, Administrative Law Judge ("ALJ"). Applying the "whole man" theory, the ALJ found Earleen Haynes ("Haynes") to be totally occupationally disabled due to an injury that she sustained while she was employed by Huntington as a branch manager. After reviewing the record on appeal, we find no error and affirm.

Haynes testified that on March 10, 1997, after finishing a discussion with her area manager, she was leaving her

office when her heel caught on a chair mat and she fell. She was taken by ambulance to a hospital where she was treated and released. The next day, Haynes saw her family physician, Dr. Gary Shearer, who referred her to Dr. John Schmitz. Dr. Schmitz, in turn, referred her to Dr. Lee Greiner, who ultimately performed lower back surgery on Haynes in November 1997. Haynes testified that she has not returned to work since her surgery and that she suffers from lower back pain, right leg pain, numbness, and depression. She also indicated that she has difficulty walking and must use a cane or walker for support. Haynes further testified that she has a history of lower back problems that goes back to 1991. Prior to the incident of March 10, 1997, Haynes had undergone four (4) surgeries to her lower back. She testified, however, that none of these surgeries had ever had any impact on her ability to work.

The evidence in the record concerning Haynes's physical condition consists of: the deposition and records of Dr. Shearer, a family practitioner; the deposition and records of Dr. Robert Jacob, an evaluating orthopedic surgeon; records from Drs. Greiner and Hwa-Shain Yen, both neurosurgeons; records from Dr. Kendall Hansen, a pain specialist; records from Dr. Schmitz, an orthopedic surgeon; and records from St. Elizabeth's Hospital, Associates in Primary Care, the Kentucky Diagnostic Center, and Mayfield Neurological Institute, Inc. From among these items of evidence, we have focused primarily upon the depositions and records of Drs. Shearer and Jacob.

Dr. Shearer testified that he had been Haynes's family physician since March 22, 1991, and that he had examined her on March 12, 1997 - two days following the incident in question. He also testified that prior to her fall, Haynes had undergone four lower back surgeries and that she had an active symptomatic condition. However, he believed that this condition had no effect on her ability to work regularly at her job. Dr. Shearer further indicated that the injuries suffered by Haynes as the result of her fall - in particular, a recurrent herniated disk - exacerbated her condition to the point that she could not return to work. He diagnosed her condition as continued chronic back pain due to injury, multiple surgeries, and scar tissue. He also noted that Haynes had experienced extreme muscle spasms immediately prior to her injury but that since the fall, the spasms had worsened and rendered her back rigidly straight and firm.

Dr. Shearer assigned Haynes a 48% permanent functional impairment and explained that the American Medical Association ("AMA") Guides did not fully reflect her condition because of the extreme pain and chronic spasms from which she suffered. He attributed 50% of the impairment to Haynes's pre-existing active condition and the other 50% to the injuries that she sustained as the result of her fall. Dr. Shearer ultimately concluded that Haynes could do no more than take care of her personal needs and that she could not return to work. On cross-examination, Dr. Shearer testified that without the pre-existing active condition,

the incident of March 10, 1997 would not have physically disabled Haynes.

Dr. Jacob testified that he had performed an independent medical examination of Haynes on June 24, 1998. He assigned her a 10% permanent functional impairment for radiculopathy under the AMA Guides and opined that this impairment pre-existed the injury due to her fall. Dr. Jacob further testified that he believed that Haynes was capable of working in a sedentary capacity. On cross-examination, Dr. Jacob admitted that Haynes apparently had been able to perform all of her duties at work prior to March 10, 1997.

The evidence in the record concerning Haynes's psychological condition consists of the depositions and records of Dr. Robert Granacher, a psychiatrist, and Dr. Thomas McCann, a clinical psychologist. Dr. Granacher testified that he examined Haynes on January 7, 1998. He opined that she suffered from a mild degree of major depression and a pain disorder. Dr. Granacher assigned Haynes a 15% functional impairment due to these impairments with 50% of this impairment attributable to physical conditions and the other 50% attributable to exaggeration of her mental state.

Dr. McCann testified that he examined Haynes on January 6, 2000. Based on this examination, he opined that Haynes suffered from a severe reactive depression that was linked very closely to her physical condition. Dr. McCann further testified that her psychological condition was caused or aggravated by the March 10, 1997 incident because of the physical limitations it

placed on her ability to work. He ultimately assigned Haynes a Class IV functional impairment.

The ALJ rendered an opinion and order on June 16, 2000, finding that Haynes was totally occupationally disabled. His reasoning for his decision reads – in pertinent part – as follows:

KRS 342.0011[(11)](c) defines permanent total disability as "... the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury...." KRS 342.0011(34) defines work as "... providing services to another in return for remuneration on a regular and sustained basis in a competitive economy."

In this instance, I am persuaded that the Plaintiff is permanently and totally disabled under the above definition. I am further persuaded by the opinion of Dr. Shearer that the Plaintiff had a prior active nonwork-related functional impairment. Dr. Shearer was, however, also of the opinion that she was able to perform her job prior to the injury of March 10, 1997 but following the injury could do no more than take care of her personal needs. Ms. Haynes had worked for the Respondent/Employer since 1978 and had progressed to her position of branch manager prior to her March 10, 1997 injury. I am, therefore, persuaded by the Plaintiff's testimony and the opinion of Dr. Shearer, in conjunction with the findings of Dr. Greiner, who performed the Plaintiff's surgery following the March 10, 1997 incident, as well as the opinions of Drs. Granacher and McCann that the March 10, 1997 incident, by itself, has rendered the Plaintiff permanently and totally disabled. Pursuant to the "whole man" theory as set forth in International Harvest v. Poff, Ky., 331 S.W.2d 712 (1959) the Plaintiff shall be entitled to benefits for permanent total disability beginning March 10, 1997, and continuing for so long thereafter as she shall remain disabled, with said benefits to terminate as of the date she qualifies for

normal old-age Social Security Retirement benefits under 42 USC § 301 to 1398(f).

Subsequently, Huntington filed a Petition for Reconsideration, taking issue with a number of the ALJ's factual findings and legal conclusions. On July 27, 2000, this petition was denied, and Huntington appealed to the Workers' Compensation Board. On appeal, the Board affirmed. This appeal followed.

Huntington's sole contention before this court is that the facts of this case did not justify the application of the "whole man" theory enunciated in International Harvester v. Poff, supra. Huntington does not challenge the ALJ's conclusion that Haynes was totally disabled. Instead, it argues that the evidence clearly indicated that Haynes's disability was not caused solely by the March 10, 1997, incident but that it was caused by a combination of that episode and Haynes's prior active condition. Accordingly, Huntington submits that an award of total disability benefits was inappropriate. This same argument was raised before the Board, and we cannot say that in addressing this issue the Board "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, 687-88 (1992). After our review, we adopt the Board's well-reasoned opinion as our own:

In [Ira A. Watson Department Store v. Hamilton, Ky., 34 S.W.3d 48 (2000)] the [Kentucky] Supreme Court ruled that pursuant to the 1996 amendments to KRS 342.730, awards for permanent partial disability are a function of the worker's AMA Guides

impairment rating, the statutory multiplier for that rating, and whether the worker is capable of returning to his pre-injury employment. In such instances, the ALJ has very limited discretion when determining the extent of a worker's permanent partial disability. See, KRS 342.730(1)(b) and (c)1. However, the Court further determined that whether a particular worker has sustained a partial or total disability, as defined by KRS 342.0011(11), clearly requires a weighing of the evidence concerning whether the worker will be able to earn income by providing services on a regular and sustained basis in a competitive economy. For that reason, the Court concluded that some of the principles established in the landmark decision of Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968), remain viable when determining whether a worker's occupational disability is partial or total. In fact, the Court specifically stated, in relevant part, as follows:

An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with Osborne v. Johnson, supra, it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes [a] consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so [is] affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. See, Osborne v. Johnson, supra, at 803.

Although the Act underwent extensive revision in 1996, the ALJ remains in the

role of the fact-finder. KRS 342.285(1). It is among the functions of the ALJ to translate the lay and medical evidence into a finding of occupational disability.[...]

Hence, although functional impairment ratings and how they are apportioned, absolutely control the structuring of awards in permanent partial disability situations, total disability awards are another matter. In total disability situations, the standard remains purely one of "occupational disability," as defined in Osborne v. Johnson, supra, and its progeny. Therefore, as correctly addressed by the ALJ below, the question was not whether Haynes had any prior active functional impairment, but whether she was suffering from any prior active occupational disability as a result of that functional impairment.

Active disability is defined as the degree of occupational disability that existed immediately prior to the subsequent injury without regard to the effects of the subsequent injury. Griffin v. Booth Memorial Hosp., Ky., 467 S.W.2d 789 (1971) and Wells v. Bunch, Ky., 692 S.W.2d 806 (1985). Thus, prior active disability must be measured as a decrease in wage earning capacity due to injury or loss of ability to compete considering the claimant's customary occupation, age, and education. Under the "whole man" doctrine, if a work-related injury, in and of itself, is sufficient to render the claimant totally occupationally disabled without regard to the pre-existing active disability, the claimant is entitled to be awarded benefits, as here, for permanent total occupational disability with no offset for pre-existing active disability. Schneider v. Putnam, Ky., 579 S.W.2d 370 (1970).

Contrary to the assertions of Huntington, therefore, since the Osborne, supra, occupational disability standard remains applicable to total permanent occupational disability situations, an Administrative Law Judge also retains the discretion in such claims to apply the "whole man" doctrine enunciated in International Harvester v. Poff, supra.

As the parties are well aware, in a workers' compensation claim, the worker bears the burden of proving each of the essential elements of her cause of action. Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). However, the burden of proving the existence of a pre-existing active occupational disability falls upon the defendants. Therefore, the issue before us is whether the evidence compels a finding of prior active occupational disability. Compelling evidence is defined as evidence which is so overwhelming that no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224 (1985). So long as the ALJ's opinion is supported by any evidence of substance, we must affirm. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

The ALJ concluded that pursuant to Dr. Shearer's opinion, Haynes had a prior active nonwork-related functional impairment. However, the ALJ properly did not equate this with any prior active occupational disability, also based on Dr. Shearer's opinion, along with Haynes' own testimony that she could perform all of her job duties prior to the March 10, 1997 injury. In our view, this evidence is more than sufficient to support the ALJ's ultimate holding.

In conclusion, the presence of pre-existing active disability remains an occupational determination rather than a medical determination in total disability determinations. We find nothing in the modification of the Kentucky Workers' Compensation Act that occurred on or after December 12, 1996, that indicates otherwise, especially in light of Ira A. Watson Department Store v. Hamilton, *supra*. While the existence of a pre-existing impairment may constitute evidence that would support a finding of pre-existing active disability, such a finding is not mandated under the facts of this case. Seventh Street Road Tobacco Wrhse. [v.] Stillwell, Ky., 550 S.W.2d 469 (1976) and Wells v. Bunch, *supra*. In the case *sub judice*, the ALJ relied on the evidence from Haynes and Dr. Shearer that although Haynes had undergone prior back surgeries, she was fully capable of performing her job as a bank manager. Hush v.

Abrams, Ky., 584 S.W.2d 48 (1979). We are, therefore, without authority to find otherwise. Special Fund v. Francis, supra.

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

ALL CONCUR.

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