

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002185-WC

KROGER COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-57881

OLA FAY WILSON AND HON. IRENE STEEN,
ADMINISTRATIVE LAW JUDGE; WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: BUCKINGHAM, COMBS, AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: Kroger Company petitions for our review of an opinion of the Workers' Compensation Board (Board) affirming an opinion and award by an administrative law judge (ALJ) granting Ola Fay Wilson an award of temporary total disability (TTD) income benefits for a period from August 17, 1998, through May 11, 1999, to be followed by an award of permanent partial disability income benefits. We affirm.

Wilson was born on August 13, 1943, and began working for Kroger on July 27, 1977. In 1993, she began experiencing problems with both hands while working in the deli and cake-

making section. Wilson testified that her hands would hurt when she had to squeeze the tubes of frosting to decorate the cakes. She further testified that she averaged decorating between 30-40 cakes per day and that she performed the job by herself for approximately three years. Wilson requested to be transferred out of the deli section in January 1997 because of ongoing symptoms involving her hands. The transfer occurred in June 1997.

In January 1998, Wilson developed pain in her left shoulder. In July 1998, Dr. Scott Riley diagnosed Wilson with carpal tunnel syndrome in her hands and a torn left rotator cuff in her shoulder. At that time, Dr. Riley advised her that her carpal tunnel syndrome was work-related. Wilson testified that she was unaware that her condition was work-related until being advised of that fact by Dr. Riley. Thereafter, Wilson completed accident forms at Kroger for both her left shoulder injury and hand injuries.

Prior to going on vacation during July 1998, Wilson advised the Kroger store management that she would be retiring subsequent to her vacation. Her last day of work at Kroger was on August 13, 1998, and she testified that she took early retirement due to medical reasons, including back problems and hand and shoulder problems. On August 17, 1998, Wilson underwent surgery to her left shoulder and both hands. According to Dr. Riley, Wilson did not reach maximum medical improvement until May 11, 1999. She has not worked since that time.

Wilson filed an Application for Resolution of Injury Claim for both her left shoulder condition and carpal tunnel conditions on January 4, 1999. In an opinion and award rendered on December 20, 1999, the ALJ awarded Wilson TTD income benefits ending May 11, 1999, plus permanent partial disability income benefits based upon an eight percent rating due to her carpal tunnel syndrome. The ALJ declined to award her permanent partial disability based upon her rotator cuff injury. Kroger appealed the award to the Board, which issued an opinion affirming the ALJ's decision. This petition for review followed.

Kroger's first argument is that Wilson's claim for carpal tunnel syndrome was barred due to failure to comply with the applicable statute of limitation and notice requirements of KRS¹ Chapter 342.² KRS 342.185(1) provides:

Except as provided in subsection (2) of this section, no 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 and unless an application for adjustment of claim for compensation with respect to the injury shall have been made with the department within two (2) years after the date of accident,

KRS 342.185(1). Because Wilson began experiencing work-related hand problems in 1993 and gave notice of her injury and filed her claim in 1998, Kroger argues that her claim was time-barred due to the aforementioned statute.

¹ Kentucky Revised Statutes.

² All references herein to the statutes will be to those statutes in effect when Wilson filed her claims.

In determining that Wilson's carpal tunnel syndrome claim was not time-barred by the statute, the ALJ stated as follows:

The question in this case thus becomes whether Plaintiff herein knew that she had sustained an injury in 1993 when she began experiencing problems with her hands. Obviously, her problems were not occupationally disabling as she did not quit her work until 1998, subsequent to the surgery herein, and it is my opinion, based upon the testimony in this record, that Plaintiff did not, in fact, know that she had sustained an injury. She did know, however, that her work would aggravate her symptoms, however, I cannot impute her with the medical knowledge required to make the determination that her hand problems could indeed be classified as repetitive injuries due to her work, rather than from other sources. It was not until she was informed by Dr. Riley that Plaintiff acquired this knowledge. Thus, I am not applying the Alcan case, as I find it is inappropriate to do so in this particular case. I, therefore, find that Plaintiff's notice was timely and that her claim does not violate the Statute of Limitations.

On appeal to the Board, the Board stated that it had reviewed recent decisions of the Kentucky Supreme Court in Special Fund v. Clark, Ky., 998 S.W.2d 487 (1999), and Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96 (1999), and had found no error in the ALJ's ruling on notice or statute of limitation.

The ALJ found that "[u]pon cross-examination, Plaintiff admitted that since around 1993, when she began doing the cake decorating, she knew that her job squeezing the frosting tubes made her hands hurt worse, and that there was something about her job which was causing her to have a problem." Kroger argues that this testimony and the ALJ's findings clearly required a

conclusion that Wilson's carpal tunnel syndrome claim was time-barred.

The Kentucky Supreme Court held in the Clark case that:

[W]here a claim is not filed until more than two years after the worker's discovery of an injury and the fact that it was caused by work, KRS 342.185 would operate to prohibit compensation for whatever occupational disability is attributable to trauma incurred more than two years preceding the filing of the claim. [Emphasis added.]

Id. at 490. In the case *sub judice*, the ALJ made a factual determination that Wilson did not know that her hand problems resulted from her work rather than from other sources until she was informed of this fact by Dr. Riley in July 1998.

The issue before this court is whether the decision of the ALJ was supported by substantial evidence. Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735, 736 (1984). The ALJ "has the authority to determine the quality, character and substance of the evidence[.]" Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985). As a reviewing court, we will not substitute our judgment for that of the ALJ as a fact finder. Id. at 420. Under these standards, we conclude that there was substantial evidence to support the ALJ's determination that Wilson's notice was timely given and her claim was filed within the limitation period.

Kroger's second argument is that Wilson was not entitled to an award of TTD income benefits because she was voluntarily retiring and was not contemplating a return to work. "Temporary total disability" as defined in KRS 342.0011(11)(a)

"means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment[.]" In affirming the award of TTD benefits by the ALJ, the Board noted that "[n]othing in the definition of TTD precludes an award of TTD simply because a claimant has retired from a job held with a particular employer." The Board also noted that upon reaching maximum medical improvement following her surgeries, Wilson was "free, as a matter of law, to seek other employment if she so desires." We agree with the Board's analysis of this issue and adopt it as our own. Thus, we hold that the ALJ did not err in awarding TTD benefits to Wilson.

As the reviewing court, our function "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." Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992). We hold that the Board has not overlooked or misconstrued controlling statutes or precedent or committed a flagrant error in assessing the evidence.

Therefore, the opinion of the Board is affirmed.

ALL CONCUR.

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