

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002658-WC
and
NO. 2000-CA-002873-WC

ANITA THOMASSON

APPELLANT/CROSS-APPELLEE

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-83212

RYAN'S FAMILY STEAKHOUSE;
WORKERS' COMPENSATION BOARD;
and DONALD SMITH, ADMINISTRATIVE
LAW JUDGE

APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING IN PART,
REVERSING IN PART,

AND

REMANDING

** ** * * * * *

BEFORE: BARBER, BUCKINGHAM, AND MILLER, JUDGES.

BUCKINGHAM, JUDGE: Anita Thomasson petitions for review from an opinion of the Workers' Compensation Board (Board) which reversed an award of benefits by an administrative law judge (ALJ) based on permanent partial disability. While we agree with the Board on two issues, we conclude the Board misconstrued the controlling statute concerning a third issue. Thus, we affirm in part and reverse in part and remand.

Thomasson worked at Ryan's Family Steakhouse in Owensboro, and her duties included baking, cooking, cleaning, and stocking. On February 1, 1999, Thomasson worked a double shift. Her workday started at 8:00 a.m. and ended at 10:00 p.m. Her duties that day included baking in the morning and cooking in the afternoon and evening. Once closing time arrived, she cleaned the kitchen.

Included among other cleaning chores, Thomasson was required to scrub the underside of a shelf that rests high above the preparation table. To see the underside of the shelf, she had to lean over the table while twisting her head and neck backward. While maintaining that position, Thomasson had to extend her arm upward to scrub. This cleaning regimen took approximately forty-five minutes during which time her head and neck remained in an awkward position.

On the following morning, Thomasson awoke with severe pain and limited mobility in her neck that rendered the turning of her head virtually impossible. Despite the pain and difficulty, she worked her shift but never returned to work after that day. Because the pain did not subside, she visited her family physician on February 8, 1999. He referred her to a neurosurgeon, Dr. David Eggers, who examined Thomasson on March 9, 1999. On March 23, 1999, Thomasson sought treatment from Dr. Kara Liebenauer, a chiropractor. Dr. Liebenauer took Thomasson's history and conducted an extensive physical examination. Dr. Liebenauer conducted Dynamometer testing, neutral cervical compression testing, Jackson's lateral flexion

compression test, cervical distraction test, reverse Adson's test, and Valsalva maneuver. On the basis of these tests and the history Thomasson provided, Dr. Liebenauer diagnosed her with spasmodic torticollis (ST), possible cervical disk herniation or rupture, or thoracic outlet syndrome.

Dr. Liebenauer later referred Thomasson to Dr. Matthew Kern, a neurosurgeon for further evaluation. Dr. Kern determined that Thomasson did not suffer from obviously herniated cervical disks and deemed her a non-surgical patient. Because Thomasson continued to have pain, Dr. Liebenauer referred her to Dr. Walter Olson, a neurologist specializing in movement disorders. Dr. Olson took Thomasson's history, reviewed her medical records, and conducted a thorough physical examination. In addition to examining her head, nose, ears, throat, neck, and extremities, he conducted the Folstein Minimental State Examination to test her higher cortical function. He also examined her cranial nerves.

Dr. Olson noted a limited range of motion of the head and neck and a tendency for the head to turn to the left. Relying upon the history and the physical examination of Thomasson, Dr. Olson diagnosed spasmodic torticollis, a movement disorder. In addition, he found the prolonged awkward positioning a "plausible cause" of Thomasson's ST and stated in his deposition that "she doesn't have anything else that is a proximate cause." Dr. Olson found a 28%-51% impairment rating under the AMA Guidelines.

At the direction of Ryan's, Thomasson was examined by Dr. Gregory E. Gleis, an orthopaedic surgeon. He diagnosed her

with neck pain and did not believe a strong causal relation for work injury existed. He further indicated that if the injury were work-related, he would assess a 5% whole person impairment.

Thomasson's claim for benefits was filed on May 28, 1999. An award of benefits was made by an ALJ on April 14, 2000. First, the ALJ determined that Thomasson's condition was work-related. The ALJ found Thomasson's testimony to be credible and also cited the testimony of Dr. Olson and Dr. Liebenauer in this regard. The ALJ held that "[a]lthough there is evidence to the contrary this Court did not find that to be persuasive." The ALJ next addressed the issue regarding whether Thomasson's condition met the definition of "injury." Again citing testimony from Dr. Olson and Dr. Liebenauer, the ALJ held that the circumstances on February 1, 1999, constituted an "injury" as that term is defined in the statutes. Ryan's then appealed to the Board.

In an opinion rendered on October 18, 2000, the Board agreed with the ALJ that the work incident constituted a "traumatic event." For purposes of the Workers' Compensation Act, "injury" is defined in part as follows:

[A]ny work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.

KRS 342.0011(1). Citing the testimony of Dr. Olson, the Board also held that the ALJ's finding that Thomasson's work activities were the proximate cause of her ST was supported by substantial

evidence in the record¹. Finally, the Board reversed the decision of the ALJ "based on the record being devoid of 'objective medical findings' which produced a change in the human organism." Thomasson then filed a petition for review with this court, and Ryan's filed a cross-petition for review.

Thomasson's sole point of contention in her petition is that the Board erred in reversing the ALJ's decision and holding that there was a lack of "objective medical findings" that an injury had occurred. KRS 342.0011(33) defines "objective medical findings" as "information gained through direct observation and testing of the patient applying objective or standardized methods."

In reaching its conclusion that the record was devoid of objective medical findings, the Board stated it was relying on an unpublished case of this court, Premier Scale Co./Indiana Scale Co. v. Kelly D. Gibbs, Case No. 1998-CA-002238-WC, wherein this court reversed the Board and its interpretation of the term "objective medical findings." In that case, the Board relied on the testimony of a neurologist that the claimant had post-concussive syndrome and directed an award of benefits for such an injury even though the condition was not evidenced by any diagnostic tests. However, a panel of this court reversed the Board and held that "a physician's medical opinion is derived

¹ If claimant prevails on his or her claim before an ALJ, the question on appeal to the Board is whether the ALJ's decision is supported by substantial evidence. See Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735, 736 (1984).

from objective medical findings and the opinion is not, itself, an objective medical finding."

Since the briefs have been filed in this case, the Kentucky Supreme Court has rendered an opinion in the Premier case which is now final.² Therein, the supreme court affirmed the panel of this court but stated that "our reasoning differs somewhat from that expressed by the majority of the Court of Appeals panel."³ See Kelly D. Gibbs v. Premier Scale Company/Indiana Scale Company, Ky., 50 S.W.3d 754 (2001). The supreme court first noted that unless the harmful change in the human organism was evidenced by objective medical findings, then it was not compensable as an "injury" as that term is defined in KRS 342.0011(1). Id. The court next agreed that a diagnosis was not an objective medical finding, but a diagnosis must be supported by objective medical findings in order to establish the existence of a compensable injury. Id. However, the court further reasoned:

In view of the evidence which was presented in this particular case, a question has arisen concerning whether a harmful change must be, or is capable of being, documented by means of sophisticated diagnostic tools such as the x-ray, CAT scan, EEG, or MRI in order to be compensable. Contrary to what some have asserted we are not persuaded that it must. Furthermore, at least to some extent, we view that question as being off the mark. Likewise, we are not persuaded that a harmful change must be both directly observed and apparent on testing in order to be compensable as an injury.

² The opinion became final on August 24, 2001, and is to be published.

³ The opinion of this court in Premier was by a 2-1 vote.

In the instant case, the claimant has focused upon the shortcomings of the sophisticated diagnostic tools. However, in addition to testing which utilizes the aforementioned diagnostic tools, a wide array of standardized laboratory tests of physical and mental function is available to the medical practitioner. Although there may not be a standardized test which would apply to every conceivable symptom of which a patient might complain, or every symptom which cannot be directly observed, such tests are capable of confirming the existence and extent of a number of symptoms. We know of no reason why the existence of a harmful change could not be established, indirectly, through information gained by direct observation and/or testing applying objective standardized methods that demonstrated the existence of symptoms of such a change. Furthermore, we know of no reason why a diagnosis which was derived from symptoms that were confirmed by direct observation and/or testing applying objective or standardized methods would not comply with the requirements of KRS 342.0011(1).

Id. at 762. Nevertheless, the supreme court affirmed the opinion of this court on the ground that the claimant's evidence was lacking.

The facts of this case are different from those in the Premier case. In that case, the doctor made his diagnosis based on the symptoms described by the claimant. The doctor testified concerning the lack of definitive, observable physical findings of the condition. In the case *sub judice*, however, both Dr. Olson and Dr. Liebenauer, as well as other doctors, performed tests such as range of motion, strength, and reflex. Their opinions were based on Thomasson's medical history, their direct observation of her, and the results of the standardized tests. There were "objective medical findings" used as a basis for the doctor's opinions in this case, where there were none in the

Premier case. In short, we conclude, based on the Kentucky Supreme Court's recent opinion in the Premier case, that the Board erred when it failed to affirm the ALJ on this issue.

Ryan's Steakhouse argues in its petition that the work-related incident did not meet the definition of a "traumatic event" as that term is used in KRS 342.0011(1). First, we agree with the Board that the work activity in which Thomasson engaged on February 1, 1999, when she developed pain in her neck after working in an awkward position qualified as an "event" for purposes of the statute. As the Board stated, "[t]here is substantial evidence in the record to support the finding that the neck pain experienced by Thomasson was the outcome or consequence of her work activities." Second, we agree with the Board that the event qualifies as "traumatic." In North American Refractories Co. v. Jackson, Ky., 346 S.W.2d 10 (1961), the court held that "any injury caused by a work-connected external force satisfies the requirement of 'traumatic' within the meaning of [the statute][.]" Id. at 13. We conclude the Board did not err in this regard.

Ryan's second argument is that there was no credible evidence to support a finding that Thomasson's work activities were the proximate cause of her developing ST. As we have noted, KRS 342.0011(1) requires that the work-related traumatic event be "the proximate cause producing a harmful change in the human organism[.]" Ryan's argues that Thomasson had a prior history of having cricks in her neck and that the statute requires the work activities to be "the" cause of the resulting injury and not just

one of a number of possible causes. We agree with the Board that there was substantial evidence to support the ALJ's decision based on Dr. Olson's opinion and Thomasson's testimony that the work incident caused Thomasson's ST.

This court's function in reviewing the Board's decision 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 Hospital. v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992). Because we believe the Board misconstrued the applicable statute in light of this court's opinion in the Premier case, we will reverse and remand on that issue⁴. Otherwise, we perceive nothing to indicate the Board erred in assessing the evidence and thus affirm on the other issues.

The opinion of the Board is affirmed in part and reversed in part and remanded for the reinstatement of the ALJ's award.

ALL CONCUR.

BRIEF FOR ANITA THOMASSON,
APPELLANT/CROSS APPELLEE:

Daniel Caslin
Owensboro, Kentucky

BRIEF FOR RYAN'S FAMILY
STEAKHOUSE,
APPELLEE/CROSS-APPELLANT:

Mary E. Schaffner
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⁴ Because the opinion of the Kentucky Supreme Court had not been rendered in the Premier case when the Board issued its opinion, it is understandable that the Board would rely on our opinion in that case.