

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000113-WC

ENRO SHIRT/
WILSON BROTHERS, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-89387

MARY ANN RITTHALER and
HON. RONALD MAY,
ADMINISTRATIVE LAW JUDGE,
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUDGEL, Chief Judge, BUCKINGHAM and McANULTY, Judges.

BUCKINGHAM, JUDGE: Enro Shirt/Wilson Brothers, Inc., petitions for review of an opinion by the Workers' Compensation Board (Board) affirming a decision by an administrative law judge (ALJ) which awarded benefits to Mary Ann Ritthaler based on a permanent partial disability. Enro Shirt disputes the determinations that Ritthaler suffered a compensable injury and that she was entitled

to the 1.5 multiplier pursuant to KRS¹ 342.730(c)(1)1. We affirm the Board.

Ritthaler began working for Enro Shirt, a clothing manufacturer, in 1986. She performed various jobs while employed for Enro Shirt, most of which involved a knitting or other sewing-type machine. Prior to her alleged injury, Ritthaler started a piecework job that involved repetitive tasks. According to her testimony, on March 12, 1999, Ritthaler developed pain in her right hand, thumb, wrist, and arm while performing her job.

The ALJ concluded that Ritthaler suffered "degenerative changes in her right upper extremity;" that the changes were dormant and non-disabling prior to her employment; that the repetitive activity of her employment aggravated the changes "producing symptoms and causing disability for the work plaintiff was then doing for the defendant/employer;" and that Ritthaler could not return to the type of work she performed at the time of injury. Furthermore, the ALJ found a six percent whole person impairment and applied the 1.5 multiplier in accordance with KRS 342.730(1)(c)1. In a 2-1 decision, the Board affirmed the ALJ's decision. This petition for review by Enro Shirt followed.

Enro Shirt first argues that the ALJ and Board erred in determining that Ritthaler suffered a work-related "injury." Enro Shirt's argument is that, although Ritthaler may have suffered a compensable "injury" as that term was previously defined under prior Kentucky statutes and case law, the December

¹ Kentucky Revised Statutes.

1996 amendment to the applicable statute restricted the definition of "injury" in such a way as to result in a denial of benefits in this case. "Injury" is defined in KRS 342.0011(1) as follows:

Any 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. "Injury" does not include the effects of the natural aging process, and does not include any communicable disease unless the risk of contracting the disease is increased by the nature of the employment. "Injury" when used generally, unless the context indicates otherwise, shall include an occupational disease and damage to a prosthetic appliance but shall not include a psychological, psychiatric, or stress-related change in the human organism, unless it is a direct result of a physical injury.
(Emphasis added.)²

Enro Shirt's argument focuses on what it perceives as a lack of proof of a "traumatic event," a lack of proof that the traumatic event was "the proximate cause" of a harmful change in the human organism, and a lack of objective medical findings to support the determination that an injury occurred.

The issue before this court is whether there is substantial evidence to support the ALJ's conclusion that Ritthaler suffered a compensable "injury" as that term is defined in the statute. See Whittaker, Director of Special Fund v. Rowland, Ky., 998 S.W.2d 479, 481 (1999), citing Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). "Substantial evidence has

² All references to the statutes in this opinion will be to the statutes in effect when Ritthaler was injured.

been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men." Id., citing Smyzer v. B.F. Goodrich Chem. Co., Ky., 474 S.W.2d 387 (1971). Although there may have been evidence which would have supported a conclusion contrary to the ALJ's decision, that evidence may not be an adequate basis for reversing the decision. Id. at 482, citing McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974).

Enro Shirt maintains that there was no "traumatic event" in this case and that the use of that phrase in the statute incorporates the element of "a definite and identifiable time, place and occurrence." It asserts that the General Assembly did not intend to compensate a worker for a condition such as this and that "a compensable injury be something more than a mere harmful change that happens to manifest itself on-the-job."

We note, however, that the definition of "injury" includes "cumulative trauma." KRS 342.0011(1). Further, "in cases where the injury is the result of cumulative trauma, there is no single accident" Coslow v. General Elec. Co., Ky., 877 S.W.2d 611, 613 (1994). Thus, it is clear that an injury due to cumulative trauma may be compensable although there is not a single event that can be identified by time, place, and occurrence.

Enro Shirt also maintains that Ritthaler's employment was not "the proximate cause" of her condition. In this regard, the ALJ determined that the degenerative changes in Ritthaler's

right upper extremity were dormant and non-disabling but were aggravated by the repetitiveness of her employment. Further, the ALJ determined that this produced symptoms and caused disability in connection with Ritthaler's job. In McNutt Const./First Gen. Services v. Scott, Ky., 40 S.W.3d 854 (2001), the Kentucky Supreme Court held that "[w]here work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change; hence, the harmful change comes within the definition of an injury." Id. at 859. Thus, Enro Shirt's argument in this regard is likewise without merit.

Enro Shirt further maintains that the statute clearly requires evidence by objective medical findings before there may be a compensable "injury." "Objective medical findings" is defined as "information gained through direct observation and testing of the patient applying objective or standardized methods." KRS 342.0011(33). Enro Shirt asserts that the term "objective medical findings" excludes medical opinions based on only the claimant's subjective history and complaints.

In Gibbs v. Premiere Scale Co., _____ S.W.3d _____ (2001), the Kentucky Supreme Court held that there is no requirement that a harmful change be documented by means of sophisticated diagnostic tools in order to be compensable. Id. at _____. The court further held that "[w]e are not persuaded that a harmful change must be both directly observed and apparent on testing in order to be compensable as an injury. Id. Further, the court in Gibbs held that:

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 or standardized methods that demonstrates 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 _____ .

We conclude that there is substantial evidence to support the conclusion of the ALJ that Ritthaler suffered an "injury" as that term is defined in the statute. First, the repetitive nature of Ritthaler's work activity and the medical testimony supported the conclusion of a cumulative trauma. Second, Ritthaler's testimony as well as medical testimony supported the finding that her work was the proximate cause of her condition. Third, Dr. David Thurman and Dr. Thomas Harter testified as to objective medical findings of an injury.

Enro Shirt's second argument is that there was not substantial evidence to support the ALJ's finding that Ritthaler was entitled to the 1.5 percent multiplier pursuant to KRS 342.730(1)(c)1. That statute states as follows:

If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be one and one-half (1 1/2) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments.

Due to the fact that Ritthaler's injury was caused by repetitive activity, we conclude there was substantial evidence that she

could not return to the type of work she was performing at the time of her injury. Thus, the 1.5 percent multiplier in the statute applied.

The opinion of the Board is affirmed.

ALL CONCUR.

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