RENDERED: December 23, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000457-WC

SHIRLEY VONSCHOECH — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-92-004944

FISHER PRICE; SPECIAL FUND; THOMAS A. NANNEY, ADMINISTRATIVE LAW JUDGE; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: HUDDLESTON, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Shirley Vonschoech petitions for review of a decision of the Workers' Compensation Board (Board), affirming the administrative law judge's (ALJ) dismissal of her reopened claim. Appellant argues that the ALJ applied the wrong version of KRS 342.125 to her claim, that certain medical evidence should have been considered newly discovered, thus entitling her to reopening, and that the evidence compels a finding of some increase in disability. Having reviewed the record and the law, we reverse and remand.

Appellant suffered a work-related injury on July 17, 1991. She was able to return to work, and on October 12, 1993, a settlement agreement for 10% occupational disability was approved. Appellant worked until September 17, 1996 and moved to reopen her claim on November 4, 1996.

Appellant testified that after her injury she was able to return to her regular job of stocking cribs and assisting customers needing parts but was assisted by other employees in lifting heavy objects. In 1996, a change in company procedure resulted in an extreme increase in her workload. She was no longer able to sit and stand at her discretion. She complained of severe pain in her back and legs and inability to sleep without medication. She was also forced to take medication for her nerves and pain. While appellant did not feel she could return to her most recent job duties, she believed she could possibly perform the job she had between the date of injury and 1996.

The medical evidence relevant to this petition is that of Dr. John Noonan. He first examined appellant in August 1991 and treated her until May 1992. At that time, she complained of progressive and worsening pain in her back and legs, and he diagnosed chronic low back pain with some bulging at L4-5. He imposed no restrictions and assessed a 5% functional impairment rating. He re-evaluated her in June 1997. He found no significant MRI changes and opined that she was still 5% functionally impaired. He found no reason to restrict her any more than he did in 1992. In conclusion, he stated that

appellant was not currently any worse off than she was in 1992. Dr. Noonan averred that he would restrict her from prolonged sitting and standing but that he would probably have imposed the same restrictions in 1992.

The ALJ reviewed the medical evidence to determine any change in appellant's symptoms since 1993. He concluded:

> I note from reviewing Dr. Meriwether's office notes that in February 1994, she was complaining of severe pain with pain into her legs. It is apparent from the reading of the reports that plaintiff had been complaining of this same pain for many years, dating all the way back to the original injury. I further note that Dr. Noonan had treated the plaintiff from August 22, 1991 to May 8, 1992. He gave testimony which indicates that plaintiff's condition now is essentially the same as it was in 1992. He did not believe that her impairment rating had significantly increased. However, he did state that he did not believe she could return to work to do any repetitive bending, stooping or lifting of items over ten pounds. Dr. Gallo did not see the plaintiff until his evaluation in 1997, nor did Dr. Love.
>
> 3. While the plaintiff's subjective complaints have somewhat increased, it appears to me that the records reflect complaints of severe pain in her back and legs to Dr. Meriwether in 1994 going back to the original date of injury. Dr. Noonan is the only physician who saw the plaintiff both at the time of the original injury and on this reopening. He states that her condition is essentially the same.
>
> The burden of proof lies with the plaintiff <u>to establish an increase in occupational disability</u>. Under the circumstances of this case as previously outlined, I do not believe the medical evidence clearly establishes that plaintiff's <u>condition has grown worse and that her occupational disability has increased</u> since her previous settlement.

(Emphasis added.)

The Board affirmed, finding no error in the standard used by the ALJ to determine whether appellant was entitled to an increased award. The Board concluded that the ALJ compared appellant's condition at the time of the settlement and the time of reopening, which the Board felt was necessary to determine if there had been a change in occupational disability:

> The ALJ . . . addressed whether there had been a change in occupational disability by taking into account whether Von Schoech suffered a decrease in wage earning capacity due to her injury; or loss of ability to complete to obtain the kind of work she had customarily been able to do; and further, taking into consideration her age, education, occupation, effect upon Von Schoech's general health of continuing in the kind of work she was customarily able to do, and impairment or disfigurement. . . . [T]he ALJ clearly has the duty to compare medical findings at the time of settlement, and currently on reopening, in order to assess whether a change for the worse in occupational disability has occurred.

The Board also determined that the opinions of Drs. Meriwether and Noonan supported the ALJ's conclusion and that the evidence did not compel a contrary result.

Appellant's first contention is that the ALJ applied the wrong version of KRS 342.125. She asserts that the ALJ should have employed the version in effect at the time of her injury, but seemed to use the 1994 version. We disagree with appellant's interpretation but reverse for other reasons.

KRS 342.125, effective in 1991, permitted reopening upon a showing of a change of occupational disability. The 1994 amendment to KRS 342.125 required a showing of change of medical condition and occupational disability if an award was ordered

pursuant to KRS 342.730(1)(c). The December 1996 version calls for a "[c]hange of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury. . . ."

Generally, the law in effect on the date of injury fixes the rights of the injured worker. Maggard v. International Harvester, Co., Ky., 508 S.W.2d 777 (1974). Because the change in the 1994 version of the statute affected substantive rights of claimants, retroactive application of it would run afoul of KRS 446.080(3). KRS 342.0015 sets forth that only subsection eight of KRS 342.125 is remedial. As that subsection pertains to time limitations for moving to reopen, we can extrapolate that the 1996 amendment quoted above is substantive in nature and not applicable to appellant's motion to reopen. Thus, we agree with appellant that the version of KRS 342.125 in effect at the time of her injury is applicable.

While we agree with the Board that there is no evidence that the ALJ used either the 1994 or the 1996 version of KRS 342.125, we believe his interpretation of a "change of occupational disability" was too narrow. A change in occupational disability allows the ALJ to consider both physical and economic changes undergone by the claimant. Peabody Coal Co. v. Gossett, Ky., 819 S.W.2d 33 (1991). The Gossett Court specifically announced:

> [A]n award may now be reopened upon a showing of a change in occupational disability which may be supported by evidence of both physical changes and economic changes, when those economic changes are not brought on by the willful intent of the employee nor by mere

> changes in economic conditions such as a recession or plant closing. Thus, a change in claimant's ability to get or hold employment, or to maintain [her] earlier earning level, could logically be considered a change in occupational disability even though claimant's physical condition may have remained unchanged. We stress, however, that the claimant moving for reopening has the burden of showing that the decrease of wage-earning capacity, whether the result of physical deterioration or subsequent unemployability without a physical change, is due to the effects of the injury in order for an award to be increased.

Id. at 35.

Here, the ALJ appeared to base his decision only on appellant's physical condition. He stressed that her complaints remained the same and that Dr. Noonan found her physical condition to be essentially the same over time. He ignored, however, appellant's uncontradicted testimony that once her job duties were increased, she was no longer capable, because of her condition caused by the work-related injury, to complete her tasks. She went so far as to testify that she believed she could still perform her job as it existed between the date of injury and the 1996 changes but not thereafter. Thus, appellant was unable to sustain her earlier earning level not because of her own willful intent or a recession, lay-off, or plant closing, but because her employer increased her tasks.

For these reasons, we agree with appellant that the evidence does compel a finding of an increase in occupational disability from the time of the settlement. Accordingly, the case is remanded to the ALJ for further consideration consistent with this opinion. Moreover, because of the result we have

reached, appellant's argument about newly discovered evidence is moot.

ALL CONCUR.

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