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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000562-WC

FRUIT OF THE LOOM — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-96-008538

NANCY KING; SPECIAL FUND; and WORKERS' COMPENSATION BOARD — APPELLEES

AND NO. 1998-CA-000564-WC

ROBERT L. WHITTAKER, ACTING DIRECTOR OF SPECIAL FUND — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-96-008538

NANCY KING; FRUIT OF THE LOOM; RICHARD H. CAMPBELL, ADMINISTRATIVE LAW JUDGE; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: HUDDLESTON, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Fruit of the Loom (FOL) and the Special Fund each appeal from a decision of the Workers' Compensation Board (Board). The Board affirmed an Opinion, Award and Order granting Nancy King (King) total disability benefits due to a mini-trauma injury to her upper extremities. FOL argues that the award of total disability is not supported by substantial evidence; the evidence compels a finding of prior active disability due to King's bladder condition; the claim is barred by the statute of limitations; and King failed to provide due and timely notice of her injury. The Special Fund maintains that liability should have been apportioned fully to FOL and that the ALJ lacked authority to adjust King's life expectancy. We find no merit in any of these contentions, and therefore affirm.

King worked for FOL for 27 years. For the first 18 years, she was a sewing machine operator. For the next eight she worked as an auditor, and she last worked again as a sewing machine operator until March 6, 1995, when she quit. There is no question that King suffered from bladder problems after a hysterectomy and that she was limited to lifting five pounds, thus resulting in her shift from sewing machine operator to auditor. In fact, when she returned to her original job, the bladder condition again brought her problems, and she eventually even had her bladder removed. However, it is equally clear from the evidence that King suffers from bilateral tarsal tunnel syndrome, bilateral ankle pain, and bilateral wrist tendinitis.

The administrative law judge (ALJ) found that King's repetitive motion/cumulative stress injury to her upper

extremities manifested on February 10, 1995 and became disabling on March 7, 1995, the day after she ceased working, and rendered her 100% occupationally disabled. He apportioned liability equally between FOL and the Special Fund based on the opinion of Dr. Jerold N. Friesen. The ALJ determined that FOL received due and timely notice of the injury and that because the condition did not manifest until February 10, 1995, the filing of King's claim in December 1996 was not barred by the statute of limitations. He further upheld his finding of total disability based on the whole-man theory, pointing out that King was totally disabled by her upper extremity injury regardless of her bladder condition. The Board affirmed and so do we.

In reviewing a Board opinion, our duty is "to correct the Board only where [we] perceive[] 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).

The ALJ's determination of total disability was based on the medical opinions of Drs. Friesen and James Templin, King's length of employment, educational level, and lack of transferable skills. We agree with the Board that the ALJ's finding is supported by substantial evidence. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). Dr. Templin diagnosed bilateral tarsal tunnel syndrome and bilateral wrist tendinitis due to work-related activities. He assessed a 2% functional impairment rating and felt she should avoid prolonged walking and standing,

while limiting repetitive use of her arms and hands for pushing, pulling, twisting, and carrying. Dr. Friesen found bilateral carpal tunnel syndrome, possible ulnar nerve compression, osteoarthritis, possible collagen vascular disease, and possible rheumatoid arthritis. He believed her incapable of performing repetitive-use activities of the hands such as sewing or keying. He assessed a 23% functional impairment rating, with one-half due to a preexisting generalized chronic inflammatory process.

These medical opinions, when viewed in conjunction with King's eighth grade education and lack of transferable skills, certainly support a finding of total disability based solely on King's upper extremity condition. Therefore, based on the whole man theory, King's disabling bladder condition is irrelevant. Schneider v. Putnam, Ky., 579 S.W.2d 370 (1979).

Nor do we find merit in FOL's arguments regarding timely notice and statute of limitations. KRS 342.185 requires that notice of the accident be given to the employer as soon as practicable after the happening thereof. While King suffered numerous instances of discomfort in her hands and wrists over the years, the condition did not bother her to the point that it prevented her from completing her job until February 10, 1995. King notified FOL of the problem on that date. Therefore, we find no error on the ALJ's part in finding that notice was due and timely.

Similarly, the statute of limitations does not begin to run on a cumulative trauma injury until the disabling reality of the injury becomes manifest. Randall Co./Randall Div. of

Textron, Inc. v. Pendland, Ky. App., 770 S.W.2d 687 (1988). Although King experienced pain in her hands and wrists as far back as the 1970s, it was not until March 1995 that any definite disability resulted from the mini traumas. Accordingly, her claim, filed in December 1996, was timely.

The Special Fund contends that apportioning any liability to it was an error of law. It urges that Haycraft v. Corhart Refractories Co., Ky., 544 S.W.2d 222 (1976) governs the method of apportionment when the injury is cumulative in nature and the worker's entire employment was with the same employer. We agree with the Special Fund. However, Haycraft states that in such cases, the Special Fund is to be apportioned that amount of disability that probably would exist regardless of the work, and the employer is apportioned the remainder--the percentage attributable to work.

In this case, the ALJ found persuasive Dr. Friesen's opinion that King's injury and accompanying impairment were due to the arousal or aggravation of a preexisting chronic inflammatory process, whether that be an autoimmune disease or a connective tissue disease. This opinion was based on a positive ANA test and a positive rheumatoid factor. This is substantial evidence upon which the ALJ was free to rely. When applied to the Haycraft formula, the evidence supports a finding that King would probably have been disabled to some extent due to the preexisting condition regardless of the work. The ALJ found this to be fifty percent, and we cannot substitute our judgment on that finding.

The Special Fund's final argument is that the ALJ lacked the authority to adjust King's life expectancy. It argues that deducting 30.57 weeks--the period of time between King's forty-fourth birthday and March 7, 1995, the date her benefits commenced--is not authorized by statute or regulation. The Special Fund contends that actuarially speaking, a person 44 years, 0 weeks old has the same life expectancy as someone 44 years, 30.57 weeks old.

The ALJ determined:

> Per the life expectancy table set forth in 803 KAR 25:036, plaintiff's life expectancy as of the date of the onset of her total and permanent disability was 1,898.63 weeks (1,929.20 weeks, her life expectancy on the day she turned 44 years of age, minus 30.57 weeks, the time which elapsed between her birthday in August, 1994, and March 7, 1995).

The Board affirmed, finding no support in the regulations for the Special Fund's assertion that the tables mandate that the same figure be utilized for the entire year at issue.

We find guidance in Stovall v. Great Flame Coal Co., Inc., Ky. App., 684 S.W.2d 3 (1984), which recognized the importance of using the most accurate evidence to determine the duration of lifetime benefits. Furthermore, 803 KAR 25:036 states that it establishes guidelines for the ALJ to apportion benefits between the Special Fund and an employer. With these two tenets in mind, we believe that the ALJ made the most accurate finding of life expectancy for purposes of apportionment. Logic dictates that some thirty weeks into a person's forty-fourth year, her life expectancy is that much less

than the day she turned forty-four. Accordingly, we find no error with the ALJ's finding.

For the reasons stated above, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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