RENDERED: August 13, 1999; 10:00 a.m.
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Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002636-WC

SUPERAMERICA, INC. — APPELLANT

v. — PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. 96-06852

CHARLOTTE PENNINGTON; SPECIAL FUND;
HON. ZARING P. ROBERTSON,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD — APPELLEES

AND

NO. 1997-CA-002763-WC

ROBERT L. WHITAKER (DIRECTOR
OF SPECIAL FUND) — CROSS-APPELLANT

v. — CROSS-PETITION FOR REVIEW OF THE WORKERS' COMPENSATION BOARD ACTION NO. 96-06852

SUPERAMERICA, INC.;
CHARLOTTE PENNINGTON;
HON. ZARING P. ROBERTSON,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

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

BEFORE: GUIDUGLI, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: SuperAmerica, Inc., (SuperAmerica) petitions for review of a September 12, 1997 Workers' Compensation Board (Board) opinion which affirmed the Administrative Law Judge's (ALJ) award of permanent total disability benefits to Charlotte Pennington (Pennington). SuperAmerica contends that it did not receive adequate notice of the injury, that the benefits should have been limited by Kentucky Revised Statutes (KRS) 342.730(1)(b), and that Pennington's total disability award was not supported by sufficient evidence. We affirm.

In 1988, Pennington, who was a forty-nine-year-old housewife, got a divorce. In need of work, she was hired by SuperAmerica as a floral designer. Pennington's job at SuperAmercia required her to order flowers, make arrangements for their distribution to convenience stores in several states, and lift heavy containers of water. Her job involved frequent bending and stooping.

On February 9, 1995, Pennington received a large pre-Valentine's Day shipment of flowers packed in five-gallon buckets filled with water. After Pennington assisted the deliveryman in unloading all of the flowers, she put them in storage. The next day Pennington discovered that the roses were unfit for use and contacted the supplier to pick them up. When the supplier refused to pick them up, Pennington had to empty this large quantity of flowers in a dumpster, one bucket at a time. Pennington then had to cut the stems of another large shipment of flowers. Pennington testified that on February 10, 1995, she told her supervisor that, "I was down in my back," but that she would work

until the flowers were distributed to the stores. Pennington testified that she continued to work after the incident even though she was in pain because she was self-supporting and desperately needed the income. However, she would take an occasional day off when the pain flared up.

In October 1995, Pennington unloaded a shipment of flowers and felt pain in her neck and back which radiated down her leg. She visited her family physician who told her to take off from work for two weeks to recuperate. Her supervisor worked out an arrangement whereby she came to work three days a week and worked at home the other two days. Pennington followed this work arrangement from October 1995, to February 1996, and underwent physical therapy as prescribed by the company doctor.

On January 18, 1996, Pennington was referred by her family physician to Dr. Bal K. Bansal (Dr. Bansal), a general surgeon. On February 13, 1996, Dr. Bansal diagnosed Pennington with a small disk herniation at C6-7 and ordered her to stop working immediately. Dr. Bansal also found arthritic changes in her spine, as well as depression and anxiety. Dr. Bansal assigned Pennington a 30% functional impairment rating, consisting of a 15% impairment due to a cervical disk herniation, a 5% impairment for mechanical lower back syndrome and a 10% impairment for depression which was secondary to the injury. By November 1996, Dr. Bansal considered Pennington to be totally disabled, but he did not discount the possibility of modest improvement over a period of time.

On January 24, 1996, at SuperAmerica's request, Pennington was examined by Dr. Kenneth Graulich (Dr. Graulich), a neurologist. Dr. Graulich preliminarily diagnosed Pennington to be suffering from a herniated disk and was reluctant to release her to return to work or to reach any final conclusion about her condition. On February 19, 1996, after being provided various medical records, Dr. Graulich recommended physical therapy and part-time work for Pennington and opined that she would have no permanent impairment. Dr. Graulich restricted Pennington to lifting no more than 25 pounds at one time or 12 pounds frequently and to avoid excessive bending, stooping, kneeling, crawling or overhead work. In his opinion, Pennington had not reached her maximum level of medical improvement, but he believed with physical therapy she would not be permanently impaired. A report that Dr. Graulich received in September 1996, confirming a herniated disk, did not alter his conclusions.

In May 1996, at Dr. Bansal's request, Pennington was examined by Dr. James Powell (Dr. Powell), a neurosurgeon. Dr. Powell believed that the February 1995 work incident had caused a disk herniation and that the herniation was aggravated in November 1995, when she lifted more buckets of water. Dr. Powell did not recommend surgery at that time. However, when he reexamined Pennington in November 1996, the pain in her arms had become considerably worse, and he suggested surgery with a prognosis of a 70% to 80% chance of recovery although there was a remote possibility of paralysis. Dr. Powell stated that without surgery Pennington's symptoms would periodically flare up and she

could easily sustain irreversible nerve root damage. Pennington refused the surgery.

In November 1996, at SuperAmerica's request, Dr. Daniel D. Primm (Dr. Primm) examined Pennington and reviewed her medical records. He did not find evidence of any significant injury which would cause any permanent impairment. He was unsure whether Pennington had reached her maximum level of medical improvement. He suggested symptom magnification and stated that Pennington was able to return to work. Despite this prognosis, Dr. Primm gave Pennington a temporary 5% impairment rating and restricted her to lifting no more than 25 to 30 pounds at one time or 10 to 15 pounds frequently.

At the March 5, 1997 hearing, SuperAmerica raised the issues of notice, temporary total disability benefits, extent and duration of disability, apportionment and medical expenses. The ALJ made findings of fact and conclusions of law, in pertinent part, as follows:

> The plaintiff's testimony in regard to the occurrence of her injury and providing timely notice is essentially unrebutted. The defendant has provided, as an attachment to its brief, a copy of an accident report filled out in October 1995, but this document does nothing to refute the plaintiff's testimony regarding notice of her February injury. I conclude that she suffered a work-related injury on February 10, 1995, as alleged, and that she provided the defendant-employer with due and timely notice of same.
>
> Regarding the extent and duration of the plaintiff's occupational disability, this Administrative Law Judge does not entirely agree with the cervical impairment ratings assessed by Drs. Bansal and Powell. DRE cervicothoracic category III requires "significant signs of radiculopathy, such as

(1) loss of relevant reflexes or (2) unilateral atrophy with greater than a 2-cm. decrease in circumference compared with the unaffected side". There is no evidence of decreased reflexes in the record, and the plaintiff's only electrical nerve study was normal. No physician mentions atrophy. At best, the plaintiff has subjective complaints of numbness in her arms, which does not appear to meet the criteria quoted above. On the other hand, I can make neither heads nor tails of the opinions expressed by Drs. Graulich and Primm. Each witness suggested significant restrictions in January and December 1996, respectively, but neither provided a definitive opinion regarding her permanent condition. The restrictions just mentioned would prevent the plaintiff from returning to the type of work she performed for the defendant-employer, and there is nothing to suggest that her condition has improved from then until now. Considering also her age, education and work experience, I reluctantly conclude that the plaintiff is not currently capable of returning to gainful employment and is thus totally disabled. I rely upon the opinion of Dr. Bansal in concluding that the plaintiff's award should be apportioned equally between the defendant-employer and the Special Fund, pursuant to KRS 342.1202.

SuperAmerica filed a petition for reconsideration arguing that since Pennington had worked for over a year after the injury occurred and after notice had been given, pursuant KRS 342.730(1)(b)[1] her occupational disability should be

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[1] KRS 342.730(1)(b) states as follows:

(1) Except as provided in KRS 342.732, income benefits for disability shall be paid to the employee as follows:

....

(b) For permanent partial disability, sixty-six and two-thirds percent (66 2/3%) of the employee's average weekly wage but not more than seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740, multiplied by the permanent impairment rating caused by the

(continued...)

limited to a maximum of twice her functional impairment rating. The ALJ denied the petition by order dated May 28, 1997, and stated in part as follows:

> The defendant-employer is correct that KRS 342.730(1)(b) became effective April 4, 1994, prior to the date of the plaintiff's injury. However, it is abundantly clear that I entered the plaintiff's award under subsection (1)(a) of the statute, and the defendant-employer's petition is nothing more than a reargument of the merits of that decision. It is therefore OVERRULED. Francis v. Glenmore Distilleries, Ky.App., 718 S.W.2d 953 (1986)(emphasis original).

SuperAmerica appealed the matter to the Board and argued the ALJ erred (1) in finding that Pennington had given notice of her injury as soon as practicable, (2) in awarding benefits in excess of twice her functional impairment rating as required by KRS 342.730(1)(b), and (3) in finding her 100% occupationally disabled. On September 12, 1997, the Board affirmed the ALJ's opinion on all three issues, ruling as follows: (1)Pennington had given due and timely notice of her injury under KRS 342.185 when she told her supervisor "that she was down in her back the day of the incident"; (2) SuperAmerica's argument that under KRS 342.730(1)(b) Pennington's benefits should be limited to twice her impairment rating was misplaced

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[1](...continued)

> injury or occupational disease as determined by "Guides to the Evaluation of Permanent Impairment," American Medical Association, latest edition available, times the factor set forth in the table that follows:....

[In the definition section of Chapter 342, KRS 342.0011(b) defines "permanent partial disability" as "the condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work"].

because the plain wording of subsection (b) states that it applies only to permanent partial disability rather than total disability; and (3) the ALJ's finding of total disability was supported by substantial evidence. Both SuperAmerica and the Special Fund filed a petition for review with this Court.

We review this case under the standard set forth in Western Baptist v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992), wherein the Supreme Court stated that "[t]he function of further review of the WCB in the Court of Appeals is to correct the Board only where the the [sic] 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." It has long been settled that the ALJ has sole authority to determine what evidence to believe, Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977), and is charged with determining the quality, character, and substance of the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Since Pennington had the burden of proof before the ALJ and was successful, the question on appeal is whether the ALJ's decision was supported by substantial evidence. It is not enough for SuperAmerica to show that the record contains some evidence which might support a different result. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974).

The first issue concerns the notice given by Pennington. KRS 342.185 states that "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....” In Reliance Diecasting Co. v. Freeman, Ky.App., 471 S.W.2d 311, 312 (1971)(citation omitted), the Court stated that “notice of injury must be given, and this means notice of ‘the specific injury for which the employee is claiming compensation.’” Pennington told her supervisor on the day of her injury that she was “down in her back”. This was the injury for which she was claiming a right to compensation. The fact that she continued to work does not negate the fact she gave notice of her injury when it happened as required by statute. Notice involves a mixed question of law and fact. When there is substantial evidence to support the finding made by the ALJ as to notice, we must affirm. Newberg v. Sleets, Ky.App., 899 S.W.2d 495, 498 (1995).

The second issue concerns SuperAmerica’s argument that Pennington’s benefits should have been limited under KRS 342.730(1)(b) to a maximum of twice her functional impairment rating. The Board agreed with the ALJ that KRS 342.730(1)(b) did not apply to Pennington’s claim since that subsection deals with permanent partial disability. We agree with the Board. The plain language of the statute states that it only applies to permanent partial disability and Pennington was totally disabled. See note 1, supra.

SuperAmerica also claims that the finding of total disability must be reversed because it was not supported by substantial evidence. The Board concisely stated SuperAmerica’s argument as follows:

> Finally, Super[A]merica contends the ALJ's finding of total occupational disability is clearly erroneous and not supported by the evidence, referring to what it contends are minimal impairment ratings assigned to Pennington's condition, to the fact that the ALJ totally disagreed with the impairment ratings assigned to Pennington's cervical condition by Drs. Bansal and Powell, the only physicians who found any permanent impairment, and yet still found Pennington to be totally disabled. It also contends that various inconsistencies apparent in Pennington's testimony casts considerable doubt on her veracity.

We believe the Board throughly addressed this argument, and we adopt that part of its opinion as our own:

> Since Super[A]merica was unsuccessful in persuading the ALJ that Pennington was anything other than totally disabled, the question on appeal is whether the ALJ's decision was supported by substantial evidence. Wolf Creek Colleries v. Crum, Ky.App., 673 S.W.2d 735 (1984). Substantial evidence is evidence that has sufficient probative value to induce conviction in the minds of reasonable men when taken alone or in light of all the evidence. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298 (1972), and Smyzer v. B.F. Goodrich Chemical Co., [Ky.,] 474 S.W.2d 367 (1971). On appeal, Super[A]merica must show there is lack of substantial evidence to support the ALJ's decision, and it is not enough to show that the record contains only some evidence which would support a reversal. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). Because the Board may not substitute its judgment for that of the ALJ on questions of fact, if the ALJ's determination is supported by any evidence of substance, it cannot be said that the evidence compels a different result. Special Fund v. Francis, supra. The ALJ alone is to determine the weight and credibility of the evidence. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). To the extent there are questions about the credibility of Pennington, those questions were resolved by the ALJ.

In making a determination of occupational disability in a claim, the ALJ must look at the totality of circumstances and all the factors enumerated in KRS 342.0011(11) and Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968). Seventh St. Road Tobacco Wrhse. v. Stillwell, Ky., 550 S.W.2d 469 (1976). Medical evidence may be probative on the issue of occupational disability; however, it is not determinative. The ALJ is not inexorably bound to be fully persuaded by the specific testimony of any one medical witness. Commonwealth Department of Highway v. Gay, Ky., 472 S.W.2d 508 (1971), and Hudson v. Owens, Ky., 439 S.W.2d 565 (1969). Furthermore, where medical evidence may be conflicting on the issue of occupational disability, the ALJ has the sole responsibility to weigh and assess the credibility of the evidence. Caudill v. Maloney's Discount Stores, supra. The ALJ may reject or accept any testimony and may believe or disbelieve various parts of the evidence including evidence from the same witness. Codell Constr. Co. v. Dixon, Ky., 478 S.W.2d 703 (1972).

Notwithstanding the fact that the ALJ disagreed with the impairment ratings assigned to Pennington's cervical condition by Drs. Bansal and Powell, there is still evidence of substance to support the ALJ's finding of total occupational disability. Pennington has a ninth grade education, and her only occupational experience is that attained as a floral designer for Super[A]merica. Dr. Bansal, at the time he gave his deposition, did not feel she could return to that work or any other gainful employment. Dr. Graulich would restrict Pennington from lifting more than 25 pounds maximally and 12 pounds frequently and from excessive bending, stooping, kneeling, crawling, or overhead work. Dr. Primm would restrict her from lifting not more than 25 to 30 pounds maximally or 10 to 15 pounds frequently although he felt these restrictions would be temporary and that she would improve over time. In our opinion, in light of her educational level and occupational experience and the medical evidence in this claim, there is evidence of substance to support the ALJ's finding of

> total occupational disability, and that finding may not be disturbed on appeal.

Since the Board did not overlook or misconstrue controlling statutes or precedent or commit an error in assessing the evidence so flagrant as to cause gross injustice, we affirm the opinion of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Hon. William P. Emrick
Ashland, Kentucky

BRIEF FOR APPELLEE:

Hon. MaLenda S. Haynes
Grayson, Kentucky

BRIEF FOR SPECIAL FUND:

Hon. David R. Allen
Frankfort, Kentucky