

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002780-WC

BRUCE WALTERS FORD SALES, INC.

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-89127

DELMER BOLDEN;
HON. J. KEVIN KING,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI, MILLER AND TACKETT, JUDGES.

GUIDUGLI, JUDGE. Bruce Walters Ford Sales, Inc., (hereinafter "Walters") has petitioned this Court for review of the November 28, 2001, opinion of the Workers' Compensation Board (hereinafter "the Board") affirming the Administrative Law Judge's (hereinafter "ALJ") opinion and award. The ALJ awarded Delmer Bolden (hereinafter "Bolden") total and permanent occupational disability benefits and attributed the entirety of the disability to his work-related injury to his left shoulder in 2000. Having considered the parties' arguments and the record, we affirm.

Bolden is currently a forty-five (45) year old resident of Virgie, Kentucky, and has an 8th grade education. He cannot read, but can apparently write some words. He does not have any specialized or vocational training. After shelving produce for about a year, he began working in the coal mining industry in 1975. He injured his left shoulder in a 1981 work-related accident, underwent surgery and returned to light-duty work a year later. He subsequently returned to his regular work as a feeder operator without any problems from his left shoulder. He continued working in the coal mining industry until 1991 when the mine he worked for filed for bankruptcy. He then began to work as a mechanic for Walters.

Bolden sustained a second work-related injury to his left shoulder in January, 2000, while attempting to install a rear-end. The jack slipped, and the rear-end fell as he held it, causing his left shoulder and arm to be pulled down. He began treating with Dr. Anbu K. Nadar. Bolden has not been able to work since just after the work incident. He continues to complain of pain from his left shoulder to his elbow, and is depressed due to his inability to support his family.

Bolden filed an Application for Resolution of Injury Claim on January 4, 2001. The ALJ considered evidence from Dr. Nadar, Pikeville Methodist Hospital, Dr. Scott Mair, and Dr. Phillip Corbett, as well as Bolden's testimony from his deposition and from the final hearing. As there is no dispute regarding the ALJ's summary of the medical evidence, we shall follow the Board and rely upon his summary as set forth in the

ALJ's opinion and award and reproduced in the Board's opinion. Based upon the submitted evidence, the ALJ adopted Dr. Corbett's testimony that half of Bolden's impairment was due to the 2000 work injury and the other half actively pre-existed the work injury. The ALJ found that Bolden had a 6.5% permanent partial disability rating directly attributable to the work injury. He then determined that Bolden was totally disabled pursuant to KRS 342.0011(11)(c). Although acknowledging that he had an active medical impairment prior to the second work injury, the ALJ found that it did not result in any active vocational disability and therefore found that Bolden's current total vocational disability was a result of the 2000 work injury.

Following the denial of its petition for reconsideration, Walters filed a notice of appeal to the Board and argued that the ALJ erred in failing to carve out any portion of the award to the pre-existing active impairment. The Board affirmed, and Walters petitioned this Court for review raising the same issue.

In Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992), the Supreme Court addressed its role and that of the Court of Appeals in reviewing decisions in workers' compensation actions. "The function of further review of the WCB in the Court of Appeals 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." Id., at 687-88. In this case, we have determined that the Board did not

commit any error and correctly decided the matter. Because we cannot improve upon it, we shall adopt portions of the Board's well-reasoned opinion as our own.¹

On appeal, although not specifically delineated, we find it to be apparent that ALJ King, in making the above ruling, applied the "whole man" theory enunciated in International Harvester v. Poff, Ky., 331 S.W.2d 712 (1959). Even so, Walters contends there is no evidence in the record that Bolden's 2000 injury alone rendered him totally occupationally disabled. Walters therefore insists that a portion of Bolden's "total disability" should have been found prior active and attributable to his 1981 injury, and therefore noncompensable.

Given the Kentucky Supreme Court's decision in Ira A. Watson Department Stores v. Hamilton, Ky., 34 S.W.3d 48 (2000), we strongly disagree. In Watson, the Supreme Court ruled that pursuant to the 1996 amendments to KRS 342.730, awards for permanent partial disability are a function of the worker's AMA Guides impairment rating, the statutory multiplier for that rating, and whether the worker is capable of returning to his pre-injury employment. In such instances, the ALJ has very limited discretion when determining the extent of a worker's permanent partial disability. See, KRS 342.730(1)(b) and (c)[].

However, the Court further determined that whether a particular worker has sustained a partial or total disability as defined by KRS 342.0011(11), clearly requires a weighing of the evidence concerning whether the worker will be able to earn income by providing services on a regular and sustained basis in a competitive economy. For that reason, the Court concluded that some of the principles established in the landmark decision of Osborne v. Johnson, [Ky., 432

¹The Board included a paragraph addressing an opinion of this Court that was designated not to be published and is currently pending on appeal before the Supreme Court. Because this opinion is clearly not final and is not to be published, the Court will not adopt this portion of the Board's opinion.

S.W.2d 800 (1968)], and its progeny, remain viable when determining whether a worker's occupational disability is partial or total. In fact, the Court specifically stated, in relevant part, as follows:

An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c[]), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with Osborne v. Johnson, supra, it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes [a] consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so [is] affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of 'work' clearly contemplates that a worker is not required to be homebound in order to be found totally occupationally disabled. See, Osborne v. Johnson, supra, at 803.

Although the Act underwent extensive revision in 199[6], the ALJ remains in the role of fact-finder. KRS 342.285(1). It is among the functions of the ALJ to translate the lay and medical evidence into a finding of occupational disability. (emphasis ours).

Watson, supra, at 51, 52.

Hence, although functional impairment ratings and how they are apportioned absolutely control the structuring of awards in permanent partial disability situations,

total disability awards are another matter. In total disability situations, the standard remains one of "occupational disability" as defined in Osborne v. Johnson, supra, and its progeny. Therefore, as correctly addressed by the ALJ below, the question was not whether Bolden had any prior active functional impairment, but whether he was suffering from any prior active occupational disability as a result of that functional impairment.

Active disability is defined as the degree of occupational disability that existed immediately prior to the subject injury without regard to [the] [e]ffects of the subsequent injury. Griffin v. Booth Mem. Hosp., Ky., 467 S.W.2d 789 (1971); Wells v. Bunch, Ky., 692 S.W.2d 806 (1985). Thus, prior active disability must be measured as a decrease in wage earning capacity due to injury or loss of ability to compete considering the claimant's customary occupation, age, and education. Under the "whole man" doctrine, if a work-related injury, in and of itself, is sufficient to render the claimant totally occupationally disabled without regard to the pre-existing active impairment, the claimant is entitled to be awarded benefits, as here, for total occupational disability with no offset for pre-existing active impairment. Schneider v. Putnam, Ky., 579 S.W.2d 370 (1979).

. . .

More significantly, our Supreme Court in Hill v. Sextet Mining Corporation, [Ky., 65 S.W.3d 503 (2001)²], in a related matter recently concluded in light of its earlier holding in Watson, supra, that the "whole man doctrine" remains applicable to post December 12, 1996 claims in situations involving total disability awards. In so ruling, the Court specifically held as follows:

²At the time the Board rendered its opinion, the Supreme Court's opinion was not yet final. However, the opinion was made final and released for publication by the Supreme Court on February 21, 2002, and therefore may properly be cited at this time.

We conclude that in order for a worker to receive income benefits for a work-related harmful change under KRS 342.730(1)(a), the harmful change must warrant an AMA impairment, and the worker must have a complete and permanent inability to work due to one or more work-related harmful changes other than coal workers' pneumoconiosis or hearing loss. Furthermore, a worker who has sustained both compensable and noncompensable disability is entitled to receive income benefits for the full extent to which compensable, work-related harmful change causes a complete inability to work. See, International Harvester Co. v. Poff, Ky., 331 S.W.2d 712 (1959). Therefore, a worker with an AMA impairment from a nonwork-related condition who sustains a work-related injury may receive income benefits for total disability if there is substantial evidence that the work-related harmful change, by itself, is sufficient to cause an AMA impairment and to cause the worker to be unable to perform any work.

[Hill v. Sextet Mining Corporation, Ky., 65 S.W.3d 503, 508-9 (2001)].

Although in the above language the Court directly addresses the effect of a prior active nonwork-related impairment on a subsequent work-related impairment producing a permanent total disability, we believe, by analogy, the Supreme Court's decision in Hill, supra, is also controlling here.

As the parties are well aware, in a workers' compensation claim, the worker bears the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, Ky.App., 576 S.W.2d 276 (1979). However, the burden of proving the existence of a pre-existing active occupational disability falls upon the defendants. Therefore, the issue before us is whether the evidence compels a finding of prior active occupational disability. Compelling evidence

is defined as evidence that is so overwhelming that no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, Ky.App., 691 S.W.2d 224 (1985). So long as the ALJ's decision is supported by any evidence of substance, we must affirm. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

As correctly pointed out by Walters, ALJ King concluded that pursuant to Dr. Corbett's opinion, Bolden had a prior active work-related functional impairment. However, in our opinion, the ALJ acted well within his discretion by not equating Bolden's active impairment with any prior active occupational disability given Bolden's un rebutted testimony that prior to January 2000, he regained the ability to perform all job duties for which he had been trained during his lifetime following his 1981 work injury and surgery. In our view, this evidence is more than sufficient to support the ALJ's ultimate holding.

In conclusion, the presence of pre-existing active vocational disability remains an occupational determination rather than a medical determination, in total disability situations. We find nothing in the modification of the Kentucky Workers' Compensation Act that occurred on or after December 12, 1996 that indicates otherwise, especially in light of the Supreme Court's holdings in Ira A. Watson Department Stores v. Hamilton, supra, and Hill v. Sextet Mining Corporation, supra. While the existence of a pre-existing impairment may constitute evidence that would support a finding of pre-existing active disability, such a finding is not mandated under the facts of this case. Seventh Street Road Tobacco Warehouse v. Stillwell, Ky., 550 S.W.2d 469 (1976); Wells v. Bunch, supra. In the case sub judice, the ALJ relied on the evidence from Bolden that although the respondent had undergone prior surgery involving his left shoulder, he was fully capable thereafter of performing all job duties for which he had been trained during his working life. Hush v. Abrams, Ky., 584 S.W.2d 48 (1979); Ruby Constr. Co. v. Curling, Ky., 451 S.W.2d 610 (1970). In light of the fact that such determinations are exclusively within the purview of the

ALJ, regardless of whether we may be sympathetic to the obvious frustrations expressed by Walters in this review, as a matter of law, we are without authority to find otherwise. Special Fund v. Francis, supra.

Accordingly, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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