

RENDERED: May 30, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-002192-WC

COMPASS USEAC

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-82457

KAYE KENNEDY; HON. BONNIE C. KITTINGER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, GUIDUGLI AND McANULTY, JUDGES.

BUCKINGHAM, JUDGE. Compass USEAC petitions for review of an opinion of the Workers' Compensation Board that affirmed a decision of an administrative law judge awarding Kaye Kennedy permanent partial occupational disability benefits. We affirm.

Kaye Kennedy was born in 1965, has a ninth grade education, and has worked primarily in the food service industry. She has been employed by Compass since 1997, first as a prep cook and then as a full cook at a cafeteria operated by Compass for employees at the Paducah atomic energy plant. On

April 18, 2000, while placing frozen food stock into a walk-in freezer, Kennedy slipped and fell on ice injuring her back, hip, and left leg. Due to intense pain, she went to the hospital emergency room where she was given some medication. Shortly thereafter, she was referred to Dr. Monte Rommelman, a certified rehabilitation physician.

Dr. Rommelman examined Kennedy on May 8, 2000, and reported some tenderness to palpation along the lumbar paraspinals bilaterally and decreased lumbar flexion greater than extension. He noted that a CT scan of her lumbar spine on April 25, 2000, was negative for fracture or disk herniation. He prescribed various medications and an outpatient physical therapy program, and he released her to return to work without restrictions. Dr. Rommelman saw Kennedy again on June 6, 2000, noting some tenderness to palpation over the left sacroiliac joint. He diagnosed sacroiliac dysfunction and recommended that she use a TENS unit and sacroiliac joint belt for support of her pelvis.

Following Kennedy's complaint of continued low back and left leg pain, Dr. Rommelman administered three sacroiliac joint cortisone injections on September 7, 2000, October 24, 2000, and April 27, 2001, which provided only temporary relief. On July 11, 2001, Kennedy went to Dr. Rommelman indicating her pain had become much more severe, so he placed her back in a

physical therapy program with three weeks off work. On August 1, 2001, Dr. Rommelman released Kennedy to work with restrictions of lifting no more than 20 pounds occasionally or 10 pounds frequently, no repetitive twisting, bending or stooping, and no prolonged standing or walking. In follow-up visits in August and October 2001, Kennedy continued to complain of low back pain with minimal relief from the physical therapy program, the TENS unit, and the sacroiliac belt. Kennedy returned to work performing only light duty tasks. When she could not perform the lighter work, she was assigned to bookkeeping duties but left her job because she was not educated or qualified for that type of work.

Prior to the April 2000 incident, Kennedy had been treated by Dr. William Hogancamp, a neurologist, in 1999-2000 for a variety of conditions including low back and left leg pain with an unknown etiology. Dr. Hogancamp's notes indicate that Kennedy had developed significant low back pain with radicular left leg pain in September 1999, which moderated with medication. On April 10, 2000, eight days before Kennedy fell, Dr. Hogancamp diagnosed low back pain with left sacroiliitis and recommended physical therapy and a referral for pain management treatment. Kennedy decided not to pursue pain management at that time. However, on April 25, 2000, following her fall, she

notified Dr. Hogancamp's office that she needed a referral for pain management treatment.

On July 27, 2001, Kennedy was evaluated by Dr. Theodore Davis, a neurosurgeon, upon referral by Compass. His examination revealed straight leg raising unrestricted on the right to about 80°, but Kennedy expressed pain after 60° on the left and resisted any dorsiflexion of the foot. She tired with plantar flexion on the left, but her sensation was intact. Dr. Davis' diagnosis was lumbar strain and lumbar radiculitis. He saw Kennedy again on August 14, 2001, and noted that an examination indicated she was able to perform straight leg raising "fairly well with no gross weakness." A subsequent lumbar myelogram conducted at his request was normal with no evidence of disk herniation. Dr. Davis recommended that Kennedy remain in sedentary work.

In September 2001, Kennedy filed an application for injury claim involving the April 18, 2000, fall. On November 15, 2001, Dr. Monte Rommelman was deposed and stated that based on reasonable medical probability, Kennedy's lower back injury was causally related to the April 2000 slip and fall. He assessed a 5% whole person impairment under the American Medical Association Guides to Evaluation of Permanent Impairment (Guides) based upon a diagnosis of sacroiliac dysfunction with persistent pain. Dr. Rommelman stated that although different

from his diagnosis, Dr. Davis' diagnosis of lumbar radiculitis would also result in an impairment rating of 5-8% under the AMA Guides.

During cross-examination, Kennedy's attorney objected when Compass' attorney attempted to question Dr. Rommelman about Dr. Hogancamp's treatment of Kennedy for her back complaints prior to the April 2000 incident because Compass had not provided him with Dr. Hogancamp's medical records as required by 803 Kentucky Administrative Regulation (KAR) 25:010 Section 5(4).¹ Dr. Rommelman went on to testify that he was unaware of Dr. Hogancamp's prior treatment and that he believed Dr. Hogancamp would be the best person to determine whether Kennedy's condition worsened or changed after her fall. Dr. Rommelman also said Dr. Hogancamp's description of Kennedy's condition was consistent with the type of complaints she had voiced to him. Kennedy's counsel orally moved to strike this testimony.

In his deposition taken on January 2, 2002, Dr. Hogancamp stated that Kennedy complained of lower back pain beginning in September 1999 and had exhibited percussion tenderness and some muscle spasms on the left side. She also

¹ 803 KAR 25:010 Section 5(4) provides that any party obtaining medical records shall serve a copy of the records upon all other parties within 10 days following their receipt.

reported experiencing severe back pain after twisting her back in October 1999, which was treated with pain medication. An examination of Kennedy on April 10, 2000, eight days prior to her fall, also suggested tenderness in the left sacroiliac region. Dr. Hogancamp testified that Kennedy's complaints to Dr. Rommelman were similar to those she made to him and that their diagnoses of sacroiliac dysfunction and sacroiliitis were similar. On cross-examination, Dr. Hogancamp admitted that he had never placed restrictions on her work activity or treated her with cortisone injections or a TENS unit. His last examination of Kennedy on June 9, 2000, indicated some tenderness in the left sacroiliac region. Dr. Hogancamp stated that based on information received from Kennedy, he "understood" that her condition had worsened after the April 2000 incident.

On January 22, 2002, the ALJ conducted a hearing at which Kennedy acknowledged she had been treated for lower back pain by Dr. Hogancamp prior to the April 2000 incident, but stated that the pain was different and more severe after her fall. She testified that her prior problems had not affected her ability to work, but that after she fell she was unable to perform even the light duty work she had been assigned to perform. Kennedy stated she had not missed any work for her back or hip problems prior to the fall.

On March 22, 2002, the ALJ issued an opinion awarding Kennedy permanent partial disability benefits commensurate with a 5% functional impairment rating and appropriate multiplier under KRS 342.230(1)(c)(1). The ALJ relied extensively on the testimony of Kennedy and Dr. Rommelman and, to a lesser degree, on the testimony of Dr. Davis. As part of the opinion, the ALJ sustained the objection and motion to strike raised by Kennedy's attorney during Dr. Rommelman's deposition and stated she would not consider his responses to the questions regarding Dr. Hogencamp's treatment of Kennedy.

The Workers' Compensation Board affirmed the ALJ's decision despite disagreeing with her handling of the procedural issue. It stated that the ALJ should have ruled on the objection raised in Dr. Rommelman's deposition prior to submission of the case for a decision and allowed Compass an opportunity to correct any procedural inadequacy without prejudicing the other party if possible prior to submission. Nevertheless, the Board believed that the ALJ's ruling constituted harmless error because the testimony would not have affected the ultimate decision of the ALJ. This petition for review by Compass followed.

Compass argues that the award of benefits must be reversed because the ALJ's decision was not supported by substantial evidence. It also claims that its right to due

process was denied because the ALJ failed to consider the cross-examination testimony of Dr. Rommelman. See, e.g., Union Underwear Co., Inc. v. Scearce, Ky., 896 S.W.2d 7, 9 (1995).

This latter complaint is predicated on the ALJ's handling of the objection and motion to strike during Dr. Rommelman's deposition. This issue was rendered moot, however, because the Board found the ALJ erred but that the error was harmless. We agree with the Board that the ALJ should have made a ruling on the objection and given Compass an opportunity to correct its failure to comply with the discovery rules. For instance, Compass could have been allowed to cross-examine Dr. Rommelman at a later date at its expense after Kennedy's counsel had been provided Dr. Hogancamp's medical records.

In any event, the primary issue is whether the Board erred in holding that the ALJ's decision is supported by substantial evidence even in light of Dr. Rommelman's cross-examination testimony. Compass questions the evidence on causation. As Compass correctly points out, the claimant bears the burden of proving by substantial evidence every essential element of a claim. Burton v. Foster Wheeler Corp., Ky., 72 S.W.3d 925, 928 (2002); Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88, 96 (2000). Among those elements are that a work-related injury proximately caused the impairment resulting in occupational disability, see, e.g., Jones v. Newberg, Ky., 890

S.W.2d 284 (1994); KRS 342.0011(1) and (11), and the extent and duration of the injury, see Stovall v. Collett, Ky. App., 671 S.W.2d 256 (1984); Codell Const. Co. v. Dixon, Ky., 478 S.W.2d 703 (1972). Causation is a factual issue to be decided by the fact-finder. Coleman v. Emily Enterprises, Inc., Ky., 58 S.W.3d 459, 462 (2001).

In addition, a claimant must establish an "injury," which includes showing harmful change in the human organism evidenced by "objective medical findings," defined as "information gained through direct observation and testing of the patient applying objective or standardized methods." KRS 342.0011(33). A claimant's complaints of symptoms alone are not objective medical findings as defined by statute, but rather, they must be confirmed by direct observation or standardized tests. Gibbs v. Premier Scale Co./Indiana Scale Co., 50 S.W.3d 754 (2001). The existence of a compensable injury may be shown with either direct evidence in the form of objective medical findings or indirectly through information gained by direct observation and/or testing applying objective or standardized methods demonstrating the existence of symptoms of a harmful change. Id. at 762-63; Staples, Inc. v. Konvelski, Ky., 56 S.W.3d 412 (2001). Although KRS 342.0011(1) clearly requires that there be objective medical findings of a harmful change in the human organism in order for that change to be compensable,

it does not require causation to be proved by objective medical findings. See Konvelski, 56 S.W.3d at 415; Ryan's Family Steakhouse v. Thomason, Ky., 82 S.W.3d 889, 894 (2002).

As the fact-finder, the ALJ has the authority to determine the quality, character, and substance of the evidence. Burton, 72 S.W.3d at 928; Square D Co. v. Tipton, Ky., 862 S.W.2d 308, 309 (1993). Similarly, the ALJ has the sole authority to determine the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/PepsiCo, Inc., Ky., 951 S.W.2d 329, 331 (1997); Luttrell v. Cardinal Aluminum Co., Ky. App., 909 S.W.2d 334, 336 (1995). The fact-finder also may reject any testimony and believe or disbelieve various parts of the evidence even if it came from the same witness. Magic Coal, 19 S.W.3d at 96; Whittaker v. Rowland, Ky., 998 S.W.2d 479, 481 (1999).

When the decision of the fact-finder is in favor of the party with the burden of proof, the issue on appeal is whether the ALJ's decision is supported by substantial evidence, which is defined as some evidence of substance and consequence sufficient to induce conviction in the minds of reasonable people. Transportation Cabinet v. Poe, Ky., 69 S.W.3d 60, 62 (2001); Rowland, 998 S.W.2d at 481-82. A party challenging the ALJ's factual findings must do more than present evidence supporting a contrary conclusion to justify reversal. Poe,

supra; Ira A. Watson Dep't Store v. Hamilton, Ky., 34 S.W.3d 48, 52 (2000). Upon review of the Board's decision, the appellate court's function is limited to correcting the Board only where it 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 (1992); Phoenix Manufacturing Co. v. Johnson, Ky., 69 S.W.3d 64, 67 (2002).

Compass contends that Kennedy failed to present substantial evidence of causation. It asserts that the overwhelming medical evidence indicates that her current "complaints" existed prior to the April 2000 fall. This argument misses the point. Kennedy readily admits that she suffered some lower back and left leg pain prior to her fall. The issue is whether her condition was different in either nature or degree resulting in an impairment rating following the injury.

Compass' focus on the generic similarity in the complaints expressed by Kennedy ignores the other evidence indicating a change in Kennedy's condition. For example, Kennedy testified that the pain was different and more intense, preventing her from performing her previous duties, which testimony the ALJ found credible. The ALJ also pointed out that Kennedy had never been assessed an impairment rating, been given

work restrictions, or been taken off work because of her condition prior to the injury. Both Dr. Rommelman and Dr. Davis assessed a 5% functional impairment and restricted Kennedy to light duty work after the April 2000 incident. Prior to her fall, Kennedy eschewed pain management treatment, but subsequently she sought such treatment and used a TENS unit and a sacroiliac joint belt.

Compass' citation to the absence of abnormalities in the CT scans and myelogram after the April 2000 incident is unpersuasive. As noted earlier, causation need not be proven by objective medical findings. Nonetheless, even though the sophisticated diagnostic tests were normal, both Drs. Rommelman and Davis noted decreased range of motion and Dr. Rommelman reported muscle spasms. Although not extensive, these findings based on direct observation were sufficient to constitute objective medical findings supporting Kennedy's complaints. See Konvoleski, supra.

Compass' reliance on the testimony of Dr. Rommelman and Dr. Hogancamp likewise is misplaced. While Dr. Rommelman deferred to Dr. Hogancamp as to the existence of a change of condition, Dr. Hogancamp's testimony is equivocal. He saw Kennedy only once after the April 2000 incident and his notes indicate that Kennedy told him her lower back problems had worsened. Dr. Hogancamp was not asked for and did not express

an opinion on whether Kennedy's problems after the April 2000 incident were attributable to a pre-existing injury or the fall. See, e.g., Robertson v. United Parcel Service, Ky., 64 S.W.3d 284 (2002)(physician who examined claimant before and after work-related injury reported pre-existing impairment rating and no objective evidence of changed condition). He merely stated that she had similar complaints, but he added that it was his understanding that her condition had worsened. We agree with the Board that Dr. Hogancamp's testimony was not conclusive, but rather it only raised an inference subject to resolution by the ALJ. In light of the entire record, we believe the ALJ's decision was supported by substantial evidence and the Board did not overlook or misconstrue controlling law or commit a flagrant error in assessing the evidence.

For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

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