RENDERED: October 24, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001055-WC

JOANN BRUMMITT — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD CLAIM NO. WC-00-66642

SOUTHEASTERN KENTUCKY REHABILITATION INDUSTRIES; HON. BONNIE KITTINGER, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: McANULTY, and SCHRODER, Judges; and HUDDLESTON, Senior Judge[1].

McANULTY, JUDGE: Joann Brummitt ("Brummitt") appeals from an opinion of the Workers' Compensation Board (the "Board") affirming a decision of an administrative law judge ("ALJ") that dismissed her claim for benefits against her employer,

[1]Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

Southeastern Kentucky Rehabilitation Industries ("Southeastern"), as insured by Century Insurance Company ("Century Insurance"). The ALJ found that Brummitt's work-related cumulative trauma injury manifested itself during a period when Kentucky Employers' Mutual Insurance ("KEMI") was the carrier at risk. Having thoroughly reviewed the record, the arguments presented herein and the applicable law, we affirm.

Brummitt began her employment with Southeastern in October 1999. During her employment with Southeastern, Brummitt's job duties included putting clips on strips of cardboard, recycling greeting cards, sewing, placing labels inside hats, inspecting ink labels and cleaning cardboard. These tasks required Brummitt to use her hands in repetitive motions, such as pinching, pulling and gripping.

While performing the tasks required by her employment, Brummitt experienced pain in her hands and arms. Specifically, Brummitt complained of pain around the wrist areas and described the pain as quick and throbbing around the thumb. Brummitt also suffered pain in her neck and shoulders. Based upon these complaints, Brummitt sought treatment from Jean Fee, a nurse practitioner, during a visit to the White House Clinic in McKee, Kentucky on April 17, 2000. After examining Brummitt, Fee noted that Brummitt suffered from "probable repetitive motion syndrome of both extremities" caused by her employment. Fee prescribed

Celebrex and ordered Brummitt to wear wrist supports. Fee did not restrict Brummitt's ability to work.

In October 2000, Brummitt returned to the White House Clinic and sought additional treatment for the pain in her hands from Dr. Daniel Adkins. During his examination, Dr. Atkins diagnosed Brummitt as having carpal tunnel syndrome. Dr. Atkins restricted Brummitt from performing activities that would aggravate the carpal tunnel syndrome. In December 2000, Brummitt was unable to return to her employment.

Brummitt filed her application for workers' compensation benefits on March 28, 2002. In her initial application, Brummitt alleged an injury date of April 17, 2000, and attached nerve conduction and EMG reports from Dr. Paul Brooks that showed bilateral, mild median neuropathies at the wrists. Brummitt also attached the April 17, 2000 medical records from nurse practitioner Fee that linked Brummitt's medical condition to her employment. It is not disputed that KEMI provided workers' compensation insurance coverage to Southeastern on April 17, 2000.[2]

On June 21, 2002, Brummitt moved to amend her application to allege an alternative injury date of October 6, 2000. In her motion to amend, Brummitt alleged that October 6, 2000, was the first time that she had been specifically

[2]KEMI cancelled Southeastern's workers' compensation policy on May 1, 2000.

diagnosed with carpal tunnel syndrome. Southeastern's workers' compensation insurance carrier during October 2000, Century Insurance,[3] did not object to Brummitt amending her claim. However, Century Insurance asserted that Brummitt's original application for benefits correctly provides that her work-related injuries manifested on April 17, 2000.

Brummitt testified both by deposition and at the final hearing that her employment duties required pinching, pulling and gripping. Brummitt testified that she first experienced pain in her hands in April 2000. Moreover, during her deposition, Brummitt testified that Fee was the first medical professional to inform her that these symptoms were work related. Brummitt further testified that, at the time of Fee's diagnosis, Brummitt did not know what carpal tunnel syndrome entailed. According to Brummitt, Dr. Atkins was the first person to explicitly inform her that she was suffering from carpal tunnel syndrome.

In addition to the clinical records from the White House Clinic, medical evidence was provided in three reports filed in the record. Dr. James Templin examined Brummitt on April 26, 2002, and diagnosed her with chronic lower back pain syndrome, depression, bilateral carpal tunnel syndrome, bilateral upper extremity overuse syndrome, status/post right-

[3]Century Insurance began providing workers' compensation insurance coverage to Southeastern around May 1, 2000.

sided carpal tunnel release surgery and bilateral CMC arthritis. Dr. Templin assessed a 15% whole person impairment to Brummitt and further indicated that she would be unable to return to any activity requiring extensive or repetitive use of the arms. Dr. Templin also opined that Brummitt retained no capacity to return to her former type of work.

Dr. William O'Neill first examined Brummitt on December 4, 2000. During his examination, Dr. O'Neill diagnosed bilateral carpal tunnel syndrome and proceeded to perform a right carpal tunnel release on May 17, 2001. In a letter dated March 27, 2002, Dr. O'Neill assigned Brummitt an 11% functional impairment and restricted her from repetitive use of her hands. Dr. O'Neill also restricted Brummitt from lifting more than fifteen pounds on an occasional basis and ten pounds on a frequent basis.

Finally, Dr. Joseph Zerga evaluated Brummitt on May 18, 2002. During this evaluation, Brummitt indicated that her right hand throbbed, was sore at the wrist and was sore upon movement. Brummitt also complained of difficulty turning and gripping items. Despite these complaints, Brummitt informed Dr. Zerga that the numbness in her right hand had resolved since her carpal tunnel surgery. Dr. Zerga believed that Brummitt's work activities at Southeastern could have caused the development of her carpal tunnel symptoms. Accordingly, Dr. Zerga assigned a

4.8% whole person impairment to Brummitt and restricted her from highly repetitive activity. However, Dr. Zerga stated that, as long as the work activity was not highly repetitive, Brummitt could return to regular employment as a production worker.

Prior to submitting this matter to the ALJ for a decision, KEMI and Brummitt entered into a settlement agreement. As a result of this agreement, KEMI paid Brummitt $5,000.00 for the injuries manifesting on April 17, 2000. Brummitt reserved her claim against Century Insurance regarding Dr. Atkins's October 2000 diagnosis of carpal tunnel syndrome. Accordingly, the parties herein then submitted this matter to the ALJ for a decision on whether Brummitt was entitled to any additional benefits based upon the October 2000 diagnosis. On October 28, 2002, the ALJ dismissed Brummitt's claim against Southeastern and Century Insurance after determining that Brummitt's work related injuries manifested on April 17, 2000. The ALJ further found that Brummitt was notified by nurse practitioner Fee in April 2000 that Brummitt's employment caused her medical condition. After having her motion for reconsideration denied, Brummitt timely appealed the ALJ's decision to the Board. On April 24, 2003, the Board affirmed the ALJ's decision to dismiss Brummitt's claim. This petition for review followed.

Kentucky law is extremely clear concerning the scope of our review of decisions from the Board. The function of our

review is to correct 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 injustice. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992). In pursuing workers' compensation benefits, the claimant bears the burden of proof and risk of nonpersuasion with regard to every element of the claim, with the decision of the ALJ being conclusive and binding as to all questions of fact. KRS 342.285; Carnes v. Tremco Mfg. Co., Ky., 30 S.W.3d 172, 175-176 (2000), citing Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). When the party with the burden of proof is unsuccessful before the ALJ, the issue on appeal is whether the evidence in that party's favor is so compelling that no reasonable person could have failed to be persuaded by it. Carnes, 30 S.W.3d at 176. Compelling evidence is defined as evidence so overwhelming that no reasonable person could reach the same conclusion as the ALJ. See Reo Mechanical v. Barnes, Ky. App., 691 S.W.2d 224 (1985). Where there exists evidence of substance supporting the ALJ's finding, the conclusion cannot be labeled "clearly erroneous." Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

Despite this high standard, Brummitt presents us with the argument she unsuccessfully maintained before the Board. Brummitt argues that the ALJ erred in dismissing her workers'

compensation claim because the record supports her assertion that she could not have known that she sustained a work-related injury until October 6, 2000, when Dr. Atkins specifically diagnosed her with carpal tunnel syndrome. We disagree.

Brummitt has furnished no authority supporting her assertion that no manifestation of disability can occur until the injured worker receives an accurate diagnosis of her condition. In fact, our independent research reveals that Brummitt's assertion is simply incorrect. In Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96 (1999), the Kentucky Supreme Court determined that an injury or disability manifests when the claimant discovers that a physically disabling injury has been sustained and becomes aware that the cause of this injury was work-related. The entitlement to workers' compensation benefits arises with the work-related injury, even if that injury does not result in a permanent functional impairment or permanent disability. Holbrook v. Lexmark International Group, Inc., Ky., 65 S.W.3d 908, 911 (2001). Thus, the notice and limitations provisions for a gradual injury are triggered when the worker becomes aware of the injury and knows that the injury was caused by work, regardless of whether the symptoms that led to the discovery of the injury later subside. Id. The worker, however, must reasonably be apprised of the work-relatedness of

her condition. See Toyota Motor Mfg., Kentucky, Inc., v. Czarnecki, Ky. App., 41 S.W.3d 868 (2001).

In this matter currently before us, it is clear that, on April 17, 2000, Brummitt discovered that she was suffering from repetitive motion syndrome and became aware that this condition was caused by her employment. The record reveals that Brummitt began experiencing symptoms of numbness and swelling in her hands and fingers before seeking medical treatment. After experiencing these symptoms for some period of time, Brummitt sought treatment at the White House Clinic and informed the nurse practitioner that her employment consisted of activities requiring repetitive hand and arm motions. Based upon her examination of Brummitt and from the information Brummitt provided concerning her employment duties, the nurse practitioner believed this claimant probably suffered from repetitive motion syndrome in the hands and arms. Moreover, Brummitt testified that the nurse practitioner informed her that her employment was the cause of these medical conditions. Based upon this evidence, we believe that the record clearly shows that Brummitt, on April 17, 2000, was fully aware that her physical impairments were work-related. Accordingly, Brummitt is entitled to collect benefits only from KEMI since that company was the carrier at risk on the date the injury in question manifested. Brummitt has since received the benefits

due her from KEMI through a settlement agreement. Hence, we conclude that the ALJ's decision to dismiss this matter as it relates to Century Insurance was supported by evidence of substance and that the other evidence of record fails to compel a different result.

For the aforementioned reasons, the opinion of the Workers' Compensation Board upholding the ALJ's dismissal of Brummitt's workers' compensation claim is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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