IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: September 18, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2002-SC-0838-WC

DATE 10-9-03 EnA Grau:tt,D.C

BOB EVANS FARMS, INC. — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2002-CA-0814-WC
WORKERS' COMPENSATION BOARD NO. 00-77909

NANCY RUSCH; RONALD W. MAY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The claimant received an award of permanent total disability for a work-related right shoulder injury. Although the award has been affirmed by the Workers' Compensation Board (Board) and the Court of Appeals, the employer continues to maintain that the finding of total disability was unreasonable under the evidence and contrary to public policy. Having reviewed the evidence and the arguments of the parties, we affirm.

The claimant was born in 1948 and was 53 years old when her award was rendered. She had a high school education and no vocational training. Although she worked as an apartment manager for a number of years, the majority of her work experience was as a short-order cook. On June 29, 2000, she experienced pain in her shoulder while lifting a crate of lettuce. At the time, she thought that she had only pulled a muscle and completed her shift. She was off work, as scheduled, on the

following two days. On the third day, no longer able to withstand the pain in her right shoulder, neck, arm, back, and into her left shoulder, she sought treatment at the local emergency room. When informed that she had sustained a serious injury, she notified her supervisor.

The claimant testified that she was right-handed and could no longer use that arm. She continued to experience severe pain in her right shoulder and was unable to reach or move anything due to a severely limited range of motion in her right arm. Although she testified that she had not returned to work since her injury and had not been offered light-duty work, she indicated that she was willing to return to work if the employer would accommodate her restrictions.

The general manager of the restaurant where the claimant worked testified that he knew of her medical condition and restrictions. He indicated that light-duty work as a hostess or cashier was available and that it was offered to the claimant. Furthermore, the employer filed into evidence what purported to be a letter inviting the claimant to discuss filling in for a part-time position as a hostess. The document was undated and did not contain her address.

Dr. Goodwin, an orthopedic surgeon, first saw the claimant on July 7, 2000, as a follow-up to her treatment in the emergency room. Medical records noted an acute tear in the right rotator cuff, and on November 1, 2000, he performed a complete synovectomy of the right shoulder, repaired the rotator cuff tear, and inserted a pain pump. After the surgery, the claimant developed what Dr. Goodwin described as a "frozen" or "very stiff" shoulder, and she continued to have a small tear. Another surgery was performed on the right shoulder in January, 2001, but in March, 2001, she continued to have pain in her shoulders and swelling and numbness in her hands. Dr.

Goodwin recommended continued physical therapy and indicated that although nerve conduction studies should also be performed, the insurance carrier refused to approve them. He prescribed Tylox, Neurontin, and Celebrex and was of the opinion that the claimant should remain off work.

Dr. Templin examined the claimant in May, 2001, at which time she complained of a constant dull ache in the right shoulder, neck pain, and bilateral arm and hand pain with numbness and weakness. His diagnosis included a history of fibromyalgia, chronic right shoulder pain syndrome, right rotator cuff tear, frozen right shoulder, the various surgical procedures, bilateral carpal tunnel syndrome, bilateral thoracic outlet syndrome, diffused aches and pains, chronic low back pain syndrome, and a history of adhesive capsulitis. He assigned a 14% impairment based upon a decreased range of motion in the right shoulder and added a 6% impairment for pain, resulting in a combined whole-body impairment of 19%. He prohibited any activity above shoulder level and restricted the claimant from activities requiring frequent or repetitive use of the right arm. Furthermore, he assigned extensive restrictions based upon the bilateral carpal tunnel syndrome, bilateral upper extremity overuse syndrome, and fibromyalgia.

Dr. Travis examined the claimant in August, 2001, and received a history that he considered to be appropriate to her condition. He criticized the diagnoses of carpal tunnel syndrome and fibromyalgia. Although he indicated that the claimant would have considerable difficulty in using her right arm due to the frozen shoulder and warranted an impairment rating for loss of motion, he thought that it was too late for physical therapy to be helpful. Furthermore, he thought that there were no objective findings to warrant a rating for pain.

After an exhaustive review of the lay and medical evidence, the Administrative Law Judge (ALJ) concluded that the claimant's injury caused her to be permanently and totally disabled. The employer's petition for reconsideration maintained that the finding of total disability was unwarranted under the evidence, but it did not maintain that the findings of fact were insufficient to reveal the basis for the decision and did not request any specific findings. Following the denial of its petition, the employer appealed. Its argument has been that the finding of total disability was unreasonable in view of its offer of work that accommodated the claimant's restrictions and the claimant's testimony that she would return to work if such a job were available.

Although Chapter 342 was revised extensively in 1996, the ALJ remains the finder of fact who has the sole authority to translate evidence of impairment and work restrictions into a finding of occupational disability. Commonwealth, Transportation Cabinet v. Guffey, Ky., 42 S.W.3d 618, 621 (2001). Although it is a goal of Chapter 342 that injured workers return to work, the fact remains that not all are able to do so. Another goal of Chapter 342 is to provide income benefits that will enable such workers to meet their essential needs for food, clothing, and shelter. As effective December 12, 1996, KRS 342.0011 provides, in pertinent part, as follows:

> (11)(b) "Permanent total disability" means the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury . . . .
>
> . . .
>
> (34) "Work" means providing services to another in return for remuneration on a regular and sustained basis in a competitive economy.

As we determined in Ira A. Watson Department Store v. Hamilton, Ky., 34 S.W.3d 48, 52 (2000), total disability requires a permanent impairment but also requires a consideration of such factors as the injured worker's overall physical, emotional, intellectual, and vocational status after the injury and how those factors interact.

Although a worker's testimony is of some value in determining the extent of occupational disability, an individual's willingness to work does not compel a finding that the individual is able to do so as defined in KRS 342.0011(34). Likewise, such a finding is not compelled by an employer's offer of employment. Regardless of the testimony upon which the employer relies, the lay and medical evidence as a whole clearly supported a conclusion that the claimant would not be able to provide services to another for pay on a regular and sustained basis in a competitive economy. Under those circumstances, the total disability award was consistent with public policy and was properly affirmed on appeal. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

The decision of the Court of Appeals is affirmed.

All concur.

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