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CASE IN ANY COURT OF THIS STATE.***

RENDERED: April 22, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0239-WC

DATE

5-13-04 EMA/Gravit, D.C.

SIGHTS DENIM SYSTEMS

APPELLANT

APPEAL FROM COURT OF APPEALS

v.

2002-CA-1987-WC

WORKERS' COMPENSATION BOARD NO. 99-78335

JULIE DEBORTOLI; HON. BONNIE KITTINGER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Following a work-related injury of June 1, 1999, the claimant was awarded a period of temporary total disability (TTD) followed by an award of permanent income benefits that was enhanced under KRS 342.730(1)(c)1. Although the Workers' Compensation Board (Board) affirmed the TTD award, it determined that the permanent award was not based upon an impairment that was assigned under the latest available edition of the AMA's Guides to the Evaluation of Permanent Impairment (Guides). The Court of Appeals affirmed. Continuing to appeal the TTD award, the employer maintains that it was not supported by both of the required findings of fact; that there was no evidence to support a finding that the claimant was unable to return to work during the entire period for which TTD was awarded; and that no objective medical findings supported the finding of a work-related injury. We affirm.

The claimant was born in 1966 and had a high school education. Before working for the defendant-employer, she had worked for a few months each as a Wal-Mart cashier and greeter, as a press operator, and as a temporary service employee for two different agencies. She testified that on June 1, 1999, she developed pain in her neck, arms, and shoulders after pushing and pulling large boxes of jeans to move them with a floor jack. She informed her supervisor and was sent to the company physician at the Minor Outpatient Medicine Clinic (MOM Clinic) where she was diagnosed with a neck strain, neck and left arm pain, acute cervical strain, and "DJD C spine and strain of neck." She later saw her family physician and was referred to Dr. Dominquez, a neurosurgeon. A cervical myelogram revealed a mild disc protrusion at C5-6, mild bony foraminal compromise at C5, and a mild disc bulge at C6-7. Dr. Dominquez was reluctant to recommend surgery but did prescribe physical therapy and recommended lighter work.

In May, 2000, the claimant first saw Dr. Mayron, a neurologist, on referral from her family physician. He began treating the claimant, prescribing physical therapy for the arm and shoulder symptoms as well as Inderal and Depakote for the headaches. On a September, 2000, Form 107 report, Dr. Mayron noted a history of the work-related incident, followed within a couple of hours by a tightening, aching pain in the posterior neck bilaterally. Later, it developed into a severe bi-occipital and bi-parietal headache, with numbness and aching in the shoulders, arms, and hands. Although describing the claimant as a vague historian who sometimes contradicted herself, Dr. Mayron noted a decreased perception of pin prick over the right face, chest, lower extremity, and ulnar nerve distribution. Dr. Mayron diagnosed bilateral greater occipital neuralgia with secondary migraine to which the claimant was predisposed by family history; possible

bilateral cubital tunnel syndrome or thoracic outlet syndrome; and a possible psychological component, based upon the pattern of her reaction to facial pinprick and tuning fork testing. In his opinion, the claimant's injury caused her present complaints because the onset of neck pain and headaches occurred within a couple of hours of the incident and because her previous headaches were bi-frontal, of a constant aching nature, and not severe enough to require medication. Attempting to determine the efficacy of ulnar nerve surgery for the arm and shoulder symptoms, Dr. Mayron had consulted with Dr. Zieg. In his opinion, although the claimant's arm and shoulder problems were consistent with thoracic outlet syndrome, they were attributable to the cervical area and warranted a neurosurgical consultation. Pending a discussion of those findings with the claimant, Dr. Mayron could not yet determine if she was able to return to her previous work, but he did impose restrictions on lifting more than 5 pounds and on reaching and grasping. He later testified that the purpose of the restrictions was to avoid stressing the neck muscles or further injuring the ulnar nerve.

When cross-examined by the employer in August, 2001, Dr. Mayron explained that at the time of the injury, the strain on the muscles in the back of the claimant's neck pulled on the nerves at the base of the skull, causing them to become inflamed and to trigger migraine headaches. Although she had a prior history of mild headaches and a hereditary predisposition to migraine, the work-related injury exacerbated that condition, resulting in headaches that were different in character from those she had experienced previously. When asked if there was any way to objectively confirm the existence of the headaches or their location, he stated that there was not. He indicated, however, that although he thought there might be a psychological component to her condition, nothing in the testing caused him to question the claimant's credibility. Furthermore, she was

very tender bilaterally over the greater occipital nerve at the base of the skull, a finding that he stated was consistent with muscle strain and her complaint of headaches.

Dr. Mayron testified that as of October 11, 2000, the claimant had reduced her dose of Depakote and that her headaches had subsided, occurred only rarely, and responded to Advil. She did, however, experience neck pain and stiffness after having been hit in the back of the neck with a football, so Dr. Mayron ordered physical therapy. On January 10, 2001, he noted that the headaches had become worse following cervical traction and physical therapy and that the claimant's arm and hand symptoms continued. Dr. Mayron prescribed a course of home cervical traction and indicated that he would address the paresthesia in the upper extremities after it was completed. He reported to counsel that she had not yet reached maximum medical improvement (MMI) and that he would see her again in two months. His note from March 16, 2001, indicated that the claimant had discontinued the cervical traction because it made her neck hurt worse and produced no change in the numbness and tingling in her hands. Noting that he did not think her problem was treatable with surgery, he concluded "I have nothing further that I can think of to offer her."

Dr. Sierra evaluated the claimant on April 20, 2001. Noting that MRI and cervical myelogram revealed a protrusion at C5, he assigned a 6% impairment under the Fourth Edition of the Guides. He also assigned an 18% impairment for ulnar nerve compression, for a combined impairment of 23%.

Dr. O'Keefe examined the claimant in June, 2001, and reviewed her medical records. She reported pain in the back of her neck and shoulders that went down both arms and into her fingers, and she also reported occasional headaches that responded to Advil. He performed bilateral median and ulnar nerve conduction studies that yielded

normal results. He reported a normal neurological and neuromuscular examination and noted that although MRI and myelogram revealed a very mild disc bulge, there was no evidence of cervical radiculopathy. Dr. O'Keefe assigned a 0% impairment under the Fifth Edition of the Guides and concluded that the claimant had no impairment to the neck or arms that would prevent her from performing her usual work.

Mr. McClure treated the claimant with physical therapy on referral from Dr. Dominguez. He testified regarding the presence of muscle spasms in her neck and their response to therapy. Although inconsistencies in her response to treatment caused him to question her credibility, he testified that her description of pain that started at the back of her head and moved forward was consistent with a neck injury. Likewise, he stated that eyes hurting more than the rest of the head and headaches that increased while driving or with bright lights were common findings with a neck injury. He also stated that a sensation of a hand swelling in the absence of any measured swelling was a consistent neurological symptom. On cross-examination, he acknowledged that MRI and EMG studies lent credulity to her complaints; that her range of motion and grip strength consistently improved with therapy, which would be inconsistent with malingering; and that muscle spasms were an involuntary response to an injury.

The claimant testified that she attempted to return to light duty work in October, 1999, but that she had been unable to continue even in that capacity due to pain. She also testified that she was taken off work by the MOM Clinic at that time. As of the hearing, she continued to complain of chronic neck pain that extended into her shoulders, arms, and hands with almost constant numbness and tingling.

The Administrative Law Judge (ALJ) determined that the claimant's headaches, cervical condition and ulnar nerve compression were work-related and that she had no relevant active condition at the time of her injury. Noting that Dr. Sierra had assigned impairments under the Fourth Edition of the Guides, the ALJ determined that when Dr. Mayron's and Mr. McClure's findings were compared with descriptions in the chart that was attached to Dr. O'Keefe's report, it was apparent that a 6% cervical impairment was warranted under the Fifth Edition as well as the Fourth. Noting the lack of a means to verify the Fourth-Edition ulnar impairment, the ALJ awarded permanent benefits for only the cervical condition. The parties stipulated that TTD benefits had been paid voluntarily from June 6, 1999, through October 9, 1999. Based upon Dr. Mayron's January 10, 2001, report and his note of March 16, 2001, the ALJ determined that the claimant did not reach MMI until March 16, 2001, and awarded additional TTD through that date. Denying the employer's petition for reconsideration, the ALJ further explained the rationale for the decision and noted the claimant's testimony concerning her inability to continue even on light duty work.

Until December 12, 1996, Chapter 342 did not define temporary total disability. Addressing the absence of a statutory definition, the court explained in W. L. Harper Construction Company v. Baker, Ky.App., 858 S.W.2d 202 (1993), that temporary benefits are appropriate until the worker's condition has stabilized and is not expected to improve with further treatment. At that time, any lingering disability may be viewed as being permanent. Noting that Kentucky did not recognize the concept of temporary partial disability, the court determined that TTD benefits are appropriate until further medical treatment will not improve the worker's condition or until the worker is able to return to some type of work.

As enacted effective December 12, 1996, KRS 342.0011(11)(a) governs the duration of a TTD award. It provides as follows:

"Temporary total disability" means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.

In Central Kentucky Steel v. Wise, Ky., 19 S.W.3d 657 (2000), the Court was called upon to interpret the statute when determining whether the duration of a worker's TTD award was proper under the evidence. The treating physician testified that the worker could return to work on July 11, 1997, with a five-pound lifting restriction. An August 8, 1997, report speculated that he would be able to return to work without restrictions in one month. The worker actually returned to work for a different employer at the end of September, 1997, and the treating physician testified that he reached MMI on October 28, 1997. Relying upon KRS 342.0011(11)(a) to challenge a TTD award that extended until September 30, 1997, the employer asserted, among other things, that benefits should have terminated on July 11, 1997, because the worker was released to return to work, albeit with a five-pound lifting restriction. The Court determined, however, that "[i]t would not be reasonable to terminate the benefits of an employee when he was released to perform minimal work but not the type that is customary or that he was performing at the time of his injury." Id. at 659. Noting that Wise returned to work at the end of September and did not reach MMI until October 28, the Court concluded that substantial evidence supported the ALJ's refusal to terminate TTD benefits on July 11 and the decision to award them until September 30.

As defined by KRS 342.0011(11)(a), there are two requirements for TTD: first, the worker must not have reached MMI and, second, the worker must not have reached a level of improvement that would permit a return to employment. Absent either

requirement, a worker is not entitled to TTD benefits. Appealing the claimant's award of additional TTD, the employer maintains that the ALJ failed to determine that the claimant was unable to return to work from October 10, 1999, through March 16, 2001. It also maintains that the record would not have supported a finding that the claimant's headaches prevented her from working during the period in question, even had it been made. We note, however, that nowhere did the ALJ indicate that the additional period of TTD was based solely on the claimant's headaches, and they were only one of the harmful changes that resulted from the injury. Although it has been determined that no permanent income benefits for the cervical and ulnar nerve condition were permitted under the evidence, nothing prevented the ALJ from considering the disability from those conditions when awarding TTD.

As construed in Central Kentucky Steel v. Wise, supra, KRS 342.0011(11)(a) takes into account the reality that even if a worker has not reached MMI, her temporary disability can no longer be total if she is able to return to the type of work that she performed when injured or to other customary work. Central Kentucky Steel v. Wise, supra, also stands for the principle that where a worker has not reached MMI, a release to perform minimal work does not constitute "a level of improvement that would permit a return to employment" for the purposes of KRS 342.0011(11)(a). As applied to the present case, the issue is whether the harmful changes that resulted from the claimant's injury prevented her from performing her customary work during the period in dispute.

A review of the record makes it apparent that the ALJ did consider whether the claimant was able to return to work from October 10, 1999, through March 16, 2001, and concluded that she was not. Furthermore, when denying the employers petition for reconsideration, the ALJ clearly explained that the claimant's testimony; Dr. Mayron's

September, 2000, Form 107; his report of January 10, 2001; and his note from March 16, 2001, supported a conclusion that the claimant did not reach MMI until March 16, 2001, and did not reach a level of improvement that would allow a return to employment. The duration of TTD was supported by both lay and medical evidence, and the employer has failed to show that the findings upon which it was based were unreasonable. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

The employer's final argument is that the claimant failed to demonstrate a work-related injury by objective medical findings and that her headaches were not compensable. KRS 342.0011(1) requires that the existence of a harmful change be established by objective medical findings, but it does not require such evidence of the cause of the change. Staples, Inc. v. Konvelski, Ky., 56 S.W.3d 412 (2001); Gibbs v. Premiere Scale Co., Ky., 50 S.W.3d 754 (2001). Contrary to the employer's assertion, it is apparent from the record that objective medical findings supported the existence of all of the harmful changes upon which the award was based, including the headaches. Furthermore, as the ALJ pointed out when denying the employer's petition for reconsideration, Dr. Mayron's Form 107 addressed the issue of causation, and the finding of work-relatedness was based upon his opinion. This is not a case such as Calloway County Fiscal Court v. Winchester, Ky.App., 557 S.W.2d 216, 218 (1977), where the medical evidence indicated that the incident in question was of no consequence and that the worker's disability was due solely to a previous injury. Although Dr. Mayron stated that the event of June 1, 1999, aggravated the claimant's hereditary predisposition to headaches, he also stated that the injury to her neck muscles pulled on the nerves at the base of her skull, causing them to become inflamed and trigger the headaches. Furthermore, he described a number of ways in which the

headaches following the injury differed from those that she had experienced on occasion previously, and both he and Mr. McClure explained how the headaches following the neck injury were consistent with such an injury.

The decision of the Court of Appeals is affirmed.

All concur.

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