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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: April 22, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2003-SC-0481-WC

DATE 5-13-04 Ella Graw, D.C

NORTH AMERICAN REFRACTORIES — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2003-CA-0017-WC
WORKERS' COMPENSATION BOARD NO. 00-64883

CANDACE STONE; HON. ROGER D. RIGGS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant sustained a work-related injury that was partially disabling and awarded a triple benefit under KRS 342.730(1)(c)1. The Workers' Compensation Board (Board) and the Court of Appeals affirmed the award. Appealing, the employer maintains that no objective medical evidence supported the finding that the October 20, 2000, incident caused an injury as defined by KRS 342.0011(1). It also maintains that because the claimant returned to work at the same or greater wage, she was not entitled to an enhanced benefit.

Since 1985, the claimant worked as a mold designer and builder for a company that manufactured bricks. Her previous work included brief stints as a convalescent home aide, as a maintenance worker, and as a grounds keeper for a lodge. She alleged that she injured her back on October 20, 2000, and asserted that the injury caused numbness, tingling, pain down her legs and into her feet, and depression.

The claimant testified that she was reloading plaster of Paris bins, a task that required her to lift 100-pound sacks of the material to a height of approximately three feet. A bag slipped in her hands while she was lifting it, causing her to jerk and injure her back. She experienced immediate pain, numbness, and tingling which became worse. As a result, she was unable to work from October 20, 2000, until May, 2002, at which time she returned to her previous job but on a permanent light-duty basis. She continued to work in that capacity when her claim was heard. She complained of severe low back pain, pain with walking and long periods of standing, numbness in the low back, and minimal hip movement.

The claimant described her work as requiring repetitive bending, stooping, and heavy lifting. She testified that as a result of her injury she could not lift more than 40 pounds; that she had to alternate job activities involving sitting and standing due to hip and leg pain; that her employer accommodated her by providing blueprint work when she was unable to sit or walk; that her co-workers also helped her to work within her restrictions; and that her employer had not indicated whether it would make light duty work available to her on a permanent basis. She testified that she had to file for bankruptcy due to the loss of income during the period that she was unable to work. Furthermore, she was unable to continue her previous activities such as carpentry, buying and selling furniture, and renting real estate. She maintained that as a result of her physical symptoms and financial concerns, including uncertainty over being able to continue in her job, she began to suffer from depression.

Medical records from several providers indicated that, since 1992, the claimant had been treated periodically for low back problems, including low back pain secondary to severe lumbosacral strain. Furthermore, there was evidence of early degenerative

changes in the lumbar spine. The records indicated that over the years she received medication, chiropractic treatment, and physical therapy. They also indicated that she had experienced a number of musculoskeletal problems in the upper back, neck, and shoulders.

The claimant testified that before the work-related injury she had torn a shoulder muscle and muscles in her upper and lower back. She stated that the previous lower back problems did not affect the same area and were nowhere as severe as the present injury. She also stated that it was common to have muscle injuries in her work and that she often saw a chiropractor. She maintained, however, that although her previous history included physical therapy for her lower back on more than one occasion, she had always recovered. After the October 20, 2000, incident, she did not.

Dr. Tibbs saw the claimant in February, 2001, on referral from Dr. Bansal, her treating physician. In his opinion, the CT scan and post-CT myelogram that he reviewed showed no nerve root compression. He diagnosed facet disease and recommended facet blocks and work hardening, but he did not recommend surgery.

Dr. Goldman examined the claimant in July, 2001, and reviewed the other medical reports and diagnostics. He reported that her complaints were not supported by objective clinical findings and thought that she exaggerated her symptoms. In his opinion, she was at maximum medical improvement, had no permanent impairment, and should be able to return to work without restrictions after two weeks of work hardening.

Dr. Bansal, a neurologist, reported that a post-injury MRI revealed a small left paracentral disc herniation at L5-S1 with nerve root entrapment, which accounted for

her left leg pain. He also diagnosed lumbar facet syndrome and bilateral sacroilitis. He assigned a 13% impairment for the condition and 10% for depression.

When deposed on November 5, 2001, Dr. Bansal acknowledged that the radiologist who reviewed the claimant's MRI did not report nerve root impingement or recommend surgery. He stated, however, that he had reviewed the MRI personally and did find evidence of a small disc herniation and nerve entrapment. He stated that he also observed nerve root entrapment on a December 29, 2000, myelogram but noted that Dr. Woolley had read it as showing a disc protrusion without lumbar nerve root compromise. His testimony and exam notes from earlier in the day indicated that there was significant muscle spasm in the lumbosacral area, mainly on the right; that straight leg raising was still positive at 85 degrees on the left but negative on the right; that there was tenderness in the facet joints at L4-L 5 and L5-S1; that there was some tenderness in the sacroiliac joints on both sides, with the left worse than the right; and that the other findings were unremarkable except that the claimant walked with a limp on the left side. At that time, he recommended that the claimant continue with her medications, exercise, and physical therapy and that she avoid excessive bending, stooping, or lifting more than 5-10 pounds. He thought that, at the time, she was "in no medical condition to return to work."

After reviewing the evidence, the ALJ noted that the claimant had returned to work and was earning more than she had at the time of her injury. With respect to the harmful changes that resulted from the incident, the ALJ relied upon Dr. Bansal's testimony concerning the lumbosacral impairment and chronic pain. Although noting that the claimant appeared to have a degree of anxiety over her future, the ALJ determined that the evidence she suffered from a true mental impairment was not

convincing. Based upon Dr. Bansal's testimony that the claimant could not perform her former work activities; the evidence that she was able to continue working only because her employer and co-workers accommodated her restrictions; and the claimant's belief "that she certainly could not sustain that type of activity in the future," the ALJ determined that the claimant could not perform the type of work that she performed at the time of her injury. Therefore, her partial disability award was based upon a 13% impairment and enhanced under KRS 342.730(1)(c)1.

Focusing upon the claimant's prior history of low back complaints and treatment, the employer maintains that there was no objective evidence of a new injury under the standard set forth in KRS 342.0011(1). The employer points out that Dr. Bansal ordered a CT scan, myelogram, MRI, and EMG, all of which were negative, and that he also ordered a neurological consultation with Dr. Tibbs, which also was negative. It concludes, therefore, that Dr. Bansal was wrong in stating that the myelogram showed nerve root compromise and that no objective medical findings supported the ALJ's conclusion that the claimant suffered a harmful change.

Having reviewed the evidence and the arguments of the parties, we are convinced that there was substantial evidence the claimant sustained a work-related injury as defined by KRS 342.0011(1). Contrary to the employer's argument, Dr. Bansal testified to a number of objective medical findings that established the existence of harmful changes. See Staples v. Konvelski, Ky., 56 S.W.3d 412 (2001). In addition to noting a number of consistent clinical findings, Dr. Bansal reviewed the MRI and determined that the claimant had a small disc herniation on the left. Furthermore, the presence of a herniation was supported by both Bansal's and Dr. Woolley's review of the subsequent myelogram. The significance of the fact that Dr. Bansal was the only

physician who found evidence of nerve root compromise was a matter for the ALJ to determine when weighing the conflicting medical opinions. Codell Construction Co. v. Dixon, Ky., 478 S.W.2d 703, 708 (1972).

Although the claimant acknowledged previous difficulties with her lower back, she testified that those problems had resolved. In contrast, her present symptoms affected a different area, were much more severe, and persisted even with treatment. In any event, no diagnostic testing performed before the October, 2000, incident revealed the existence of a herniated disc on the left with nerve entrapment. Under the circumstances, the ALJ's finding of a work-related injury was not unreasonable and may not be disturbed on appeal. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

The employer's second argument is that because the claimant has returned to her former job on a full-time basis, earning $4.02 more per week than she did at the time of her injury, an enhancement of her award under KRS 342.730(1)(c)1 is inappropriate. The employer acknowledges that after the ALJ's decision in this claim, the court determined that an individual who has returned to work at the same or a greater average weekly wage may receive an enhanced benefit under KRS 342.730(1)(c)1 if it is unlikely that the individual will be able to continue earning that wage for the foreseeable future. Fawbush v. Gwinn, Ky., 103 S.W.3d 5 (2003). It maintains, however, that there is no evidence the claimant will be unable to continue in her job indefinitely except "[her own] self serving testimony that she 'needs a little help' from her co-workers doing heavy lifting."

Contrary to the employer's assertion, Dr. Bansal's testimony and the restrictions that he imposed as of November, 2001, supported both the claimant's testimony and the ALJ's conclusion that she lacked the physical capacity to perform the type of work

that she was performing when injured. This was not a case where the workplace accommodations were minor. At the time of her injury, the claimant was required to lift 100-pound sacks of material; to perform repetitive bending, stooping, and heavy lifting; and was not subject to any work restrictions. As of November 5, 2001, Dr. Bansal restricted her to lifting no more than 5-10 pounds. She testified that she had to alternate job activities involving sitting and standing due to hip and leg pain; that her employer accommodated her by providing blueprint work when she was unable to sit or walk; that her co-workers also helped her to work within her restrictions; and that her employer had not indicated whether it would make light-duty work available to her on a permanent basis. Under those circumstances, the award of an enhanced benefit was not unreasonable or inconsistent with the principles that were expressed in Fawbush v. Gwinn, supra.

The decision of the Court of Appeals is affirmed.

Lambert, C.J., and Graves, Johnstone, Keller, Stumbo and Wintersheimer, JJ., concur. Cooper, J., dissents from that portion of the opinion that permits enhancement of the award under KRS 342.730 (1)(c)1. See Fawbush v. Gwinn, Ky., 103 S.W.3d 5, 13 (2003).

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