

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: March 23, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2005-SC-0624-WC

DATE 4-13-06 E.L.A.G. W.H.D.C.

KIM BRYANT

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2004-CA-2067-WC
WORKERS' COMPENSATION NO. 03-97834

DOLLAR GENERAL CORPORATION;
HON. JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that work-related incidents on September 16, 2002, and December 3, 2002, "did not result in an injury as defined by KRS 342.0011(1)" and that the latter incident "was [nothing] more than a temporary exacerbation of a pre-existing, non-work-related condition." The Workers' Compensation Board and the Court of Appeals affirmed. Appealing, the claimant asserts that the ALJ erred by failing to award temporary total disability (TTD) and medical benefits following the December incident and by failing to consider whether the September incident was also a temporary exacerbation of her pre-existing condition. Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001). We affirm.

The claimant was born in 1974 and is a high school graduate with two years of

college and vocational training in horticulture. She began working for the defendant-employer as a store manager in July, 2002. She was right handed. Her claim alleged right shoulder injuries on September 16, 2002, and December 3, 2002.

The claimant testified that her difficulties began on September 10, 2002, when she tripped, fell, and dislocated her right shoulder while at home. It was reduced under general anesthesia at the Norton Healthcare emergency room, and she was released. She dislocated the shoulder again on the following day, while she was sleeping. After a second reduction, she was put in a brace. The shoulder dislocated a third time while a nurse was moving her, and it required a third reduction.

On September 16, 2002, the claimant was stocking merchandise at work, when she was called to answer the phone. She testified that she struck the shoulder brace on a merchandise rack as she turned and dislocated her shoulder again. She stated that Dr. Tillett gave her a shot and put her shoulder back in place but that it would not stay. He ordered an MRI that was performed on the following day. She returned to work on September 18 and worked in pain for several days until his partner, Dr. Caborn, performed surgery. Two days later, she returned to very light duty. The claimant testified that she wore a brace until sometime in November and that her condition continued to improve until December 3, 2002, when she tripped over boxes in the storeroom and fell backwards, landing on her right side. She stated that Dr. Caborn pushed her shoulder back in place, gave her pain medication, and took her off work. She resumed physical therapy in mid-February but stopped because her shoulder kept slipping out of place. She had not worked since the incident and continued to see Dr. Caborn every 6 to 8 weeks.

Dr. Tillett's records indicate that on September 16, 2002, he diagnosed a

posterior subluxation of the right shoulder with labral tearing and capsular stretching. He ordered an MRI that was performed on September 19, 2002. His partner, Dr. Caborn, took over the claimant's treatment on September 20, 2002. Dr. Caborn noted that MRI confirmed a chronic posterior subluxation of the right shoulder and also revealed a possible SLAP tear of the left shoulder, which was otherwise normal. He recommended surgery to stabilize the right shoulder and performed the procedure on September 25, 2002.

As of November 1, 2002, the claimant was doing "very well." On November 19, 2002, she was experiencing a "marked exacerbation" of her symptoms due to physical therapy. Dr. Caborn indicated that he would see her back in two weeks. Two weeks later, on December 3, 2002, the claimant complained of pain in the posterior shoulder and scapula after falling. Dr. Caborn noted that x-rays showed the shoulder to be properly located and that although there was scapular winging, it had been present earlier. He continued to postpone therapy and took her off work, noting that "this has been an environment that has been difficult for her to maintain her post-operative precautions and continue her regular duties." He instructed her to continue wearing her brace and to return in four weeks.

When the claimant returned on January 6, 2003, she saw Dr. Tillett. He found no clinical or x-ray evidence of shoulder instability but recommended that she stay off work until after she saw Dr. Caborn. In a January 8, 2003, letter to the employer, Dr. Tillett noted that the claimant was post-op for posterior shoulder instability. He stated that the original injury was not work-related but that, according to her, she fell at work and re-aggravated the shoulder. He concluded, "I do not consider this condition to be a work-related injury."

On January 14, 2003, Dr. Caborn noted that the claimant had improved significantly since the surgery but suffered a setback in her rehabilitation due to the fall at work. He re-instituted physical therapy. An April 22, 2003, note indicated that she had dislocated her shoulder recently.

When deposed in December, 2003, Dr. Caborn did not think that the claimant had reached maximum medical improvement (MMI). He stated that she had very flexible tissues and gave a history of being able to sublunate her elbows spontaneously as a child. Possible causes of the multiple shoulder subluxations included a laxity of the surrounding tissues, a significant injury that damaged them, or a combination of the two. He explained that the purpose of the September 25, 2002, surgery and subsequent therapy was to stabilize the shoulder joint by re-establishing adequate tension in the tissues surrounding it. In his opinion, it was a combination of the underlying tissue laxity and multiple subluxations that eventually caused the tissue to fail and require surgery. He stated that the claimant's September 16, 2002, subluxation was consistent with the work-related incident, but he later acknowledged that there was no way to know whether the incident caused any of the tissue damage for which he performed surgery. He stated that the injury the claimant sustained on December 3, 2002, was consistent with that incident; however, he also stated that her shoulder was still in place when he saw her that day and that her condition was the same as it had been on November 19 except for her pain.

Dr. Caborn characterized Dr. Tillett's letter as being unclear and observed that "the condition" could refer either to the posterior instability in the claimant's shoulder or to a shoulder injury that eventually led to the instability. If "the condition" referred to posterior instability, the claimant had an incident at work that caused it to become more

symptomatic. In his opinion, the present need for improved tension in the shoulder tissues was due to a combination of the underlying laxity and the pre-surgical episodes, each of which made the laxity become progressively worse and result in a shoulder that would dislocate posteriorly rather than sublunate, stay out of joint, and require a reduction under general anesthesia as it had before surgery. He stated that the claimant's shoulder remained in place on December 3, 2002, and every other time that he saw her after the surgery except for one episode in which it was easily reduced without anesthesia. He also stated that any testimony by the claimant that her condition became consistently worse after the December, 2002, incident would be inconsistent with his observations.

Dr. Bilkey performed an IME on June 30, 2003, at the claimant's request. He diagnosed a posterior shoulder dislocation that originally occurred at home on September 10, 2002, and was re-injured on September 16, 2002, and December 3, 2002. Although he stated that the surgery was beneficial, he noted that the claimant's shoulder was out of joint despite her shoulder brace. In his opinion, she was not at MMI and would require additional treatment and surgery. He attributed her current complaints to the December 3, 2002, incident but stated that the initial non-work-related injury was a factor to be considered when assessing impairment. He imposed various restrictions and stated that the claimant's impairment would be 60% if she were at MMI.

Dr. Gleis conducted a medical records review on August 9, 2003, and stated that he agreed with Dr. Tillett. He noted that the claimant did not re-dislocate her shoulder on December 3, 2002, and that she was already experiencing pain as documented by the November 15, 2002, physical therapy records and the November 19, 2002, records from Dr. Caborn. Furthermore, when she hit her arm at work on September 16, 2002,

she was "in the acute post injury phase from her fall at home . . . with two subsequent spontaneous dislocations." Therefore, the work event on September 16, 2002, would not have been an injury either.

Observing that KRS 342.0011(1) defines an injury as a work-related traumatic event that is the proximate cause of a harmful change in the human organism, the ALJ determined that the claimant's current condition was not work-related. The ALJ acknowledged the claimant's argument that striking the merchandise rack with her brace was significant enough to dislocate her shoulder but noted that she had undergone three reductions of the same shoulder less than a week before the event and that two were due to a spontaneous dislocation. Noting the claimant's symptoms in November, 2002, and the evidence that her shoulder remained in place when Dr. Caborn examined her on December 3, 2002, the ALJ determined that the incident did not appear to be "anything more than a temporary exacerbation of the plaintiff's pre-existing non work-related condition." Relying on Drs. Gleis and Tillett, the ALJ determined that the two work-related incidents "did not result in a work-related injury as defined by KRS 342.0011(1)" and dismissed the claim.

The claimant's petition for reconsideration pointed out that a worker may be entitled to income and/or medical benefits for a work-related injury that causes a harmful change that is temporary rather than permanent. Robertson v. United Parcel Service, supra. She noted that the ALJ failed to address whether the September 16, 2002, incident caused a temporary exacerbation of her pre-existing non-work-related condition. She also asserted that, having found the December 3, 2002, incident to be a temporary exacerbation of her pre-existing condition, the ALJ was required to determine whether the incident caused a period of temporary total disability or necessitated any

medical expenses. Pointing to the finding that the claimant did not sustain a work-related injury on September 16 or December 3, 2002, the ALJ determined that it was unnecessary to make additional findings and denied the petition.

The claimant had the burden to prove every element of her claim, including the allegation that she sustained a work-related shoulder injury. The ALJ determined that neither incident was an injury under KRS 342.0011(1); therefore, her burden on appeal was to show that the decision was erroneous as a matter of law. American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Commission, 379 S.W.2d 450 (Ky. 1964). KRS 342.285 designates the ALJ as the finder of fact in workers' compensation claims; therefore, a finding of fact that is made under a correct interpretation of the law may not be disturbed on appeal if it is reasonable under the evidence. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). Overwhelming evidence that favors the party with the burden of proof will compel a favorable finding and render a finding to the contrary unreasonable. Id.

Noting that the claimant suffered three non-work-related subluxations of the right shoulder less than a week before September 16, 2002, two of which were spontaneous, the ALJ relied on Drs. Tillett and Gleis and concluded that the event at work probably was not what caused the same shoulder to subluxate and become symptomatic on that date. The finding was reasonable under the evidence and may not be disturbed on appeal. Special Fund v. Francis, supra. Under the circumstances, it was unnecessary for the ALJ to consider whether the event caused a temporary exacerbation of her symptoms, because Robertson v. United Parcel Service, supra, was inapplicable.

Robertson v. United Parcel Service, supra, involved the same attorney and the same ALJ as the present case. In Robertson, the only harmful change the worker

sustained from the work-related incident was a temporary flare-up in his symptoms from a pre-existing, non-work-related condition. It caused him to miss two days' work for UPS and to be temporarily unable to perform his concurrent job doing masonry. The ALJ determined that Robertson was entitled to the medical benefits the employer had paid for treating his symptoms but not entitled to TTD or permanent income benefits. Affirming the decision, the court noted that Robertson sustained an injury (trauma that caused a temporary flare-up of his symptoms) and was entitled to be compensated for reasonable and necessary medical expenses in treating the effects of the injury. However, he was not entitled to future medical benefits because he was asymptomatic before the hearing. Nor was he entitled to permanent income benefits or to TTD under the evidence.

In the present case, the ALJ stated that "the December 3, 2002, incident" did not appear to be "anything more than a temporary exacerbation of a pre-existing, non-work-related condition" and relied on Drs. Tillett and Gleis when concluding that it "did not result in an injury as defined by KRS 342.0011(1)." Citing Robertson, supra, the claimant's petition for reconsideration and request for additional findings of fact asserted that medical treatment and TTD are compensable when work-related trauma causes a temporary exacerbation of a non-work-related condition. Nonetheless, the ALJ denied the petition, reiterated the finding that the claimant did not incur a work-related injury on December 3, 2002, and refused to make additional findings. It appears, therefore, that the ALJ was convinced that the effects of the alleged fall at work on December 3, 2002, were insignificant and that the incident was not the proximate cause producing the harmful changes for which the claimant sought treatment.

Dr. Gleis was not convinced that the claimant sustained a work-related injury on December 3, 2002. Dr. Caborn's records indicate that the claimant experienced winging before December 3, 2002; that her shoulder was symptomatic on November 19, 2003, at which time Dr. Caborn postponed further therapy and instructed her to return in two weeks; that she did so on December 3, 2002; that her shoulder remained in place at that time despite the alleged fall; and that Dr. Caborn instructed her to return again in four weeks. His records also indicate that his decision to take her off work on December 3, 2002, was due to her difficulty in maintaining proper shoulder precautions while she worked. He indicated subsequently that the effect of the December 3, 2002, incident was to delay her rehabilitation and did not agree with her assertion that her condition became worse after the incident. Under the circumstances, there was substantial evidence that the alleged fall at work and its effects were not the reason the claimant saw Dr. Caborn on December 3, required subsequent medical treatment, or missed work thereafter.

The decision of the Court of Appeals is affirmed.

All concur.

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