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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: OCTOBER 19, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2006-SC-0047-WC

DATE 11-9-06 EHAGraw DC.

HELEN EGNER — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-1280-WC
WORKERS' COMPENSATION NO. 03-96846

MILLS MANOR NURSING HOME;
HON. MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) dismissed the claimant's application for benefits after finding that she did not sustain a harmful change in the human organism that was caused by the incident of October 11, 2002, and evidenced by objective medical findings. The Workers' Compensation Board (Board) and the Court of Appeals affirmed. Appealing, the claimant asserts that the ALJ applied an erroneous legal standard to the evidence and based the dismissal on insufficient findings of fact. Convinced that the ALJ applied the correct standard for decision, made adequate findings of fact, and reached a reasonable conclusion, we affirm.

The claimant was born in 1945 and began working for the defendant-employer in 1978 as a dietary aide. She was injured in 1990 and agreed to settle her claim for

work-related back and neck injuries and depression in exchange for 3 months of temporary total disability (TTD), followed by a 25% occupational disability. She continued to be treated for those conditions when, on October 11, 2002, she attempted to catch a case of orange juice cartons that fell as she pulled it down from a shelf. She later testified that she was 5' 3" tall and weighed 98 pounds and that the case of orange juice weighed about 40 pounds. Her claim alleged that the incident caused injuries to her back, neck, and nerves.

The claimant testified that she received extensive medical treatment after the 1990 injury and used a TENS unit but asserted that she felt much better by October, 2002. Acknowledging she had suffered severe depression due to pain since the 1990 injury and had taken anti-depressant medication since 1992, she asserted that her conditions had worsened since her subsequent injury on October 11, 2002. She could no longer lift small objects with her right hand, had difficulty walking, and had good and bad days. Her husband testified, listing ways in which her physical and mental complaints had worsened significantly since the 2002 injury.

Rita Suiter, the claimant's supervisor, testified that she did her job well and rarely missed work. Ms. Suiter also testified that she helped the claimant adjust her TENS unit occasionally before the 2002 incident.

A report from Dr. Tutt indicated that radiological studies from 1997 through 2003 showed no change of condition. Records from Dr. Meriwether documented the course of treatment since July, 1990. He eventually referred the claimant to his associate, Dr. Gay Richardson, who is board-certified in physical medicine and rehabilitation.

Dr. Richardson began treating the claimant in January, 2002. At that time, she diagnosed chronic myofascial pain leading to chronic pain syndrome, depression,

cervical and lumbar degenerative disc disease, and sleep disorder. She saw the claimant again in February, March, April, May, June, August, and September, 2002. The claimant returned on October 12, 2002, complaining of increased pain and severe muscle spasm since the incident at work. A subsequent MRI revealed minimal bulging at L4-5 and decreased signal at L4-5 without frank herniation. Nerve conduction studies revealed chronic bilateral S1 radiculopathy. On July 8, 2003, Dr. Richardson found the claimant to be at maximum medical improvement and assigned a 13% impairment under DRE lumbar category III. She did not think the claimant could perform her duties as a dietary aide without restrictions. She would require ongoing treatment, including pain medication and epidural injections.

When deposed, Dr. Richardson acknowledged that MRI did not reveal a significant change in the claimant's back condition and stated that the findings were not ones that would be expected from an acute injury. What worsened was the claimant's pain and ability to function, i.e., she could work before the injury but was unable to do so after the injury. Dr. Richardson acknowledged that the chronic denervation shown on EMG would not have occurred between the injury and the test. Asked to confirm that there were no objective findings to account for the claimant's increased complaints of pain "other than her subjective history of saying she hurts more," Dr. Richardson stated "That's correct."

Dr. Richardson testified that the claimant's pre-existing condition was active but stable before October 11, 2002. She apportioned only 33-50% of the impairment to the pre-existing condition because the most significant functional change occurred after the 2002 injury. When questioned subsequently whether the moderate muscle spasm that she observed on October 12, 2002, was "an objective finding of a relatively acute

injury," she responded, "It would be, had it not been present prior to that in her initial evaluation January 22, 2002." Her notes indicated that muscle spasm was also present on June 27, 2002. Dr. Richardson stated that the claimant's depression had worsened since October 11, 2002, "for various reasons" but acknowledged "this is not going to be found objectively in the notes." She also acknowledged that depression fluctuates over time. Dr. Richardson deferred to a psychiatrist regarding the amount of impairment due to depression but attributed 75% of the claimant's present condition to the 2002 injury.

Dr. Muehleman, a clinical psychologist, evaluated the claimant on May 15, 2003. He diagnosed major depressive disorder, late onset dystemic disorder, borderline intellectual functioning, chronic pain, and occupational problems. He assigned a 15-20% impairment, of which 30% was due to the 2002 injury.

Dr. McFaddden evaluated the claimant on September 17, 2003, for the employer. He noted some non-physiologic pain behaviors on physical examination. His impression included the 2002 injury, a greater than 10-year history of ongoing neck and upper extremity discomfort, a greater than ten-year history of ongoing low back and lower extremity discomfort, mild lumbar degenerative disc disease, mild cervical spondylosis, and a longstanding history of depression. He attributed the ongoing neck and low back symptoms to mild degenerative changes and characterized the arm and leg symptoms as being referred pain. In his opinion, the 2002 injury caused no cervical or lumbar impairment but did cause a 1% impairment due to pain, with the injury being an aggravation of pre-existing chronic pain. However, he stated that he assigned the impairment based on subjective pain complaints.

Dr. Granacher, a psychiatrist, evaluated the claimant for the employer on July 13, 2004. He determined that she had a 0% psychiatric impairment due to the alleged

injury, did not require job restrictions, and had the mental capacity to perform her work. He found Dr. Meriwether's notes to be "the most instructive" because they "document[ed] clearly a chronic psychiatric condition present and treated since at least 1992 by either Dr. Klauburg or Dr. Binford." He found no evidence of a new depression due to the alleged injury. He noted that the claimant had been taking Celexa for depression since 1999 and noted subsequently that she was using the same dose at the time of the alleged injury that she took presently.

Among other things, the parties stipulated that the employer paid TTD benefits from October 15, 2002, through October 9, 2003, and paid $23,841.76 in medical benefits. When the claim was submitted for a decision, the contested issues involved whether the claimant sustained an injury as defined by KRS 342.0011(1), causation or work-relatedness, extent and duration of disability, the pre-existing condition, medical benefits, and temporary total disability benefits.

After summarizing the evidence, the ALJ noted that resolving whether the claimant suffered an injury under KRS 342.0011(1) also required resolution of the issues regarding causation/work-relatedness and the pre-existing condition. The ALJ relied on Dr. Granacher regarding the psychological condition, stating that he performed an appropriate examination and based his opinions on objective medical findings. Noting the history of psychological complaints dating to 1992, the ALJ determined that the claimant's present complaints were unrelated to the alleged injury, did not constitute an injury as defined by KRS 342.0011(1), and were not compensable. Relying on Dr. McFadden regarding the claimant's physical complaints, the ALJ noted that he performed an appropriate physical examination and reviewed the claimant's medical records. In his opinion, the October 12, 2002, incident aggravated a pre-existing

disease. This caused a consistent elevation in her chronic pain and accounted for a 1% impairment based on subjective pain. Noting the absence of identifiable radiographic changes or physical findings to support an impairment rating, Dr. McFadden stated that her condition after the incident warranted a 0% impairment under DRE lumbar category 1. The ALJ then observed that for an incident to be considered an "injury" under KRS 342.0011(1), a harmful change must be evidenced by objective medical findings. Noting that subjective complaints of pain are not sufficient, the ALJ concluded that the claimant did not suffer an injury; therefore, the remaining questions were moot.

In a petition for reconsideration, the claimant complained that the ALJ relied on physicians who evaluated her only once rather than Dr. Richardson, who observed her both before and after October 11, 2002. She requested additional specific findings regarding whether the muscle spasm Dr. Richardson observed shortly after the work-related incident, the functional capacity evaluation documenting a decline in function, and Dr. Richardson's observations of a dramatic increase in depression were related to the incident at work.

The ALJ overruled the petition stating that Dr. McFadden was of the opinion that the role of the work-related incident was to aggravate a pre-existing disease. He gave the 1% impairment based on subjective complaints of pain; therefore, his opinion supported a conclusion that there was no injury as defined by KRS 342.0011(1).

The claimant raises two arguments on appeal. First, she asserts that the ALJ applied an erroneous legal standard by requiring objective medical findings of causation. Second, she asserts that the ALJ found insufficient facts to support the legal conclusion on which the decision to dismiss the claim was based.

Relying on Staples, Inc. v. Konvelski, 56 S.W.3d 412, 416 (Ky. 2001), the claimant states, correctly, that KRS 342.0011(1) requires a harmful change to be proved by objective medical findings but does not require causation to be proved with such findings. She argues that Dr. Richardson's observations were sufficient to prove the existence of a harmful change because Dr. Richardson noted a palpable muscle spasm shortly after the work-related incident, observed the decline in her physical function, and observed the worsening of her depression. Moreover, there was EMG evidence of radiculopathy and MMPI-2 evidence of a conversion reaction. Having observed the claimant both before and after the incident, Dr. Richardson's opinion was that the incident caused a decline in her physical function and worsening of her depression. The claimant asserts that in the face of this evidence and Dr. McFadden's testimony of a 1% impairment due to pain, the ALJ's explanation of the decision to dismiss the claim was palpably inadequate and the product of an erroneous interpretation of KRS 342.0011(1).

As used in Chapter 342, the word "injury" is a legal term of art. KRS 342.0011(1) defines an injury as being a work-related traumatic event that is the proximate cause producing a harmful change in the human organism that is evidenced by objective medical findings. Contrary to the claimant's assertion, we are not convinced that the ALJ misapplied KRS 342.0011(1). Nor are we convinced that the ALJ thought erroneously that the work-related aggravation of a pre-existing condition was not compensable as an injury. The ALJ simply was not persuaded that the claimant sustained a harmful change in the human organism that was caused by the incident of October 11, 2002, and evidenced by objective medical findings.

An injured worker has the burden to prove every element of a claim for benefits.

KRS 342.285 designates the ALJ as the finder of fact. Therefore, the ALJ, rather than the Board or a reviewing court, has the sole discretion to determine the quality, character, and substance of evidence; to draw reasonable inferences from the evidence; and to decide whom and what to believe. The court explained in Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986), that a finding that favors the party with the burden of proof must be upheld if it is supported by substantial evidence and, therefore, is reasonable. A party with the burden of proof who fails to convince the finder of fact has an even greater burden on appeal. The party must show that the favorable evidence was so overwhelming that no reasonable person could have failed to be persuaded.

It was undisputed that the claimant had a long history of treatment for her neck and back conditions and for depression. She alleged that the 2002 incident caused a worsening of the conditions. As explained in Gibbs v. Premier Scale Co./Indiana Scale Co., 50 S.W.3d 754 (Ky. 2001), and Staples, Inc. v. Konvelski, supra, her burden under KRS 342.0011(1) was to show that the harmful changes she alleged were proximately caused by the incident and evidenced by objective medical findings.

Dr. Richardson acknowledged that diagnostic testing revealed no significant change in the claimant's condition. Although she observed a palpable muscle spasm shortly after the incident, she acknowledged that it was not evidence of an acute injury because it was present before the incident. Although she thought the claimant was more depressed since the incident, she acknowledged that her notes contained no objective findings of increased depression. She also acknowledged that depression fluctuates over time and that there were various causes for the claimant's depression. Finally, she stated that there were no objective findings of increased pain since the

incident, only the claimant's increased complaints.

Although Dr. McFadden testified that the 2002 incident aggravated the claimant's pre-existing conditions, increasing her subjective pain complaints, his testimony did not establish that the harmful change (i.e., increased pain) was evidenced by objective medical findings. In summary, there was no overwhelming evidence establishing the existence of a harmful change that was both caused by the 2002 incident and evidenced by objective medical findings.

Contrary to the claimant's assertion, this is not a case in which the ALJ made insufficient findings to allow a meaningful appellate review. In an 18-page opinion, the ALJ recited a detailed summary of the evidence. The ALJ then set forth the factual basis that explained the decision to dismiss the claim. Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973), and Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982), do not require more.

The decision of the Court of Appeals is affirmed.

Lambert, C.J., and McAnulty, Minton, Roach, Scott, and Wintersheimer, JJ., concur. Graves, J., dissents on the ground that the ALJ erred in interpreting KRS 342.0011(1).

COUNSEL FOR APPELLANT,
HELEN EGNER:

Craig Housman
109 South Fourth Street
P. O. Box 1196
Paducah, KY 42002-1196

COUNSEL FOR APPELLEE,
MILLS MANOR NURSING HOME:

Thomas M. Edelen
David L. Murphy
Derek Patrick O'Bryan
Clark & Ward, PLLC
716 West Main Street, Suite 201
Louisville, KY 40202