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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

2008-SC-000623-WC

FINAL

DATE 5/14/09 Kelly Klaber D.C.
APPELLANT

WINTECH, INC.

V.
ON APPEAL FROM COURT OF APPEALS
CASE NO. 2007-CA-002317-WC
WORKERS' COMPENSATION BOARD NO. 04-70569

CAROLYN KING;
HONORABLE CHRISTOPHER DAVIS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Workers' Compensation Board vacated a finding that the claimant retained physical capacity to perform the type of work performed at the time of her injury and remanded the claim for a consideration of all relevant factors. A divided Court of Appeals affirmed. Appealing, the employer asserts that substantial evidence supported the finding and that the Board substituted its judgment for the Administrative Law Judge's (ALJ's). We affirm. The Board did not err in remanding because further explanation is necessary to enable it to be certain that the ALJ applied KRS 342.730(1)(c)1 properly.¹

¹ See KRS 342.285(2)(c).

The claimant worked for an auto parts manufacturer. She operated a printing jig, a machine that stamped headlamp, turn signal, and other designations onto steering column levers. The job required her to carry 25-pound totes of unfinished parts a distance of about 10 feet to her work station. Then she removed a part from the tote with her right hand; placed it in the machine, which was at or above chest level; pulled down on the part while it was stamped twice (to avoid misaligned prints); removed the finished part with her left hand; and placed the finished part "on an oven" while reaching with her right hand for another part. When all of the parts had been stamped, she carried them to inspection and repeated the process. The machine could be operated automatically, by pushing a button, but when it malfunctioned she had to "push the jig on and pull it off" manually. Sometimes parts did not fit on the die easily, which required extra force to push them on and pull them off the machine. She testified that she stamped about 450 parts per hour when the machine functioned properly and about 300 per hour when it did not.

The claimant is right hand dominant. She testified that she was operating the jig manually on October 30, 2004, when she experienced a sudden onset of pain while pushing parts forcefully onto the machine. She underwent two surgeries, a subacromial decompression and a partial rotator cuff repair. Between the surgeries she worked at a lower wage as an inspector. The employer offered to let her operate the printing jig after her recovery from the second surgery, but she asserted that she could not perform such repetitive

work. The parties offered conflicting medical evidence regarding her ability to return to the job.

Dr. Smith thought that the claimant was at maximum medical improvement from the second surgery in July 2006. He recommended functional capacity and independent medical evaluations to determine her permanent impairment rating.

Dr. Prince, a specialist in occupational medicine, evaluated the claimant in October 2006 at her attorney's request. He noted that she continued to experience constant upper arm pain that radiated into the right shoulder, elbow, and base of the neck. She also continued to experience occasional tingling in the right hand, swelling, weakness throughout the arm, and "significantly sharper pain with any sort of pushing or pulling motion." A physical examination of the right upper extremity revealed loss of range of motion, tenderness, and decreased strength in the shoulder; slight swelling; decreased elbow and grip strength; decreased sensation in the fourth and fifth fingers; and decreased reflexes at the biceps, triceps, and brachioradialis. He assigned an 8% permanent impairment rating to the injury and stated that the claimant lacked the physical capacity to return to her work as a printing jig operator, noting that the job required her to push and pull in order to load and unload parts. Dr. Prince recommended the following restrictions:

1. No forceful, repetitive or constant use of the right upper extremity. May use right hand for brief periods of holding light objects only.

2. No use of vibratory tools with the right arm.
3. No work at or above shoulder level with the right arm.
4. Limit grip, lift, push, pull force with the right arm to no more than 6 pounds maximum (rare), 2 pounds infrequently.

Rick Pounds, M.S., RECP, FABDA, performed a functional capacity evaluation at the employer's request in January 2007 and prepared a report. Validity and reliability measures indicated that the claimant gave maximum and consistent effort. She met all maximum requirements in the sedentary and light physical demand levels; could do maximum sustained pushing at cart and shoulder height into the medium demand level; could do sustained pulling at cart and shoulder height into the heavy demand level; and could lift tote boxes that weighed up to 25 pounds. Forward and overhead reaching were 89% and 68% of standard respectively. Pounds reported that she performed significantly better with her left arm than with her right on all static strength tests as well as on the following tests: maximum sustained grip strength (74 pounds versus 17 pounds), repetitive whole hand and upper extremity work (121% versus 72%), and repetitive work with the fingers (106% versus 57%).

Dr. Cervoni, an orthopedic surgeon, evaluated the claimant for the employer in January 2007. Addressing the likelihood of malingering, he noted only one positive Waddell's sign (superficial skin tender to gentle touch at right deltoid area) but no sign of simulation, distraction, regional, or overreaction.

He reported decreased range of shoulder motion, decreased upper extremity strength, decreased grip strength, and decreased sensation in the long, ring, and small fingers, all on the right side. Testing revealed a positive Tinel's sign in the right elbow and positive Froment's sign on the right side with interosseous weakness.

Dr. Cervoni assigned a 6% permanent impairment rating to the injury and thought it reasonable for the claimant's work restrictions to follow her capabilities as determined in the functional capacity evaluation. He thought that the claimant "had the potential to attain a medium physical demand level" but "would not have the ability to perform sustained or repetitive overhead right arm/shoulder activities on any consistent basis." He also stated that it would be difficult to determine if she retained the physical capacity to return to her former work without a detailed job description. Her ability to do so would depend on whether the tasks the job required complied with the restrictions from the functional capacity evaluation, on the work station she was assigned, on whether the process required her to push buttons or operate a machine manually, and on the overhead requirements.

Dr. Conte evaluated the claimant's vocational capabilities in January 2007 based on an interview and a review of the medical and functional capacity reports. He determined that she could return to prior jobs as an assistant store manager and crossing/security guard and could perform many other jobs in the cashier, personal service, clerical/administrative support, and motor

vehicle operator categories. He did not indicate that she could perform any jobs within the factory or production categories or mention her job as a printing jig operator.

The ALJ awarded income benefits based on the 6% impairment rating that Dr. Cervoni assigned but refused to enhance the award under KRS 342.730(1)(c)1. The ALJ reasoned that although the record revealed only minor differences in the objective medical evidence, the influence that the claimant's subjective complaints had on the restrictions the various physicians imposed and on their opinions varied significantly. Convinced that a two-pound lifting restriction was not credible and that the "credible and objective medical evidence" showed the claimant not to be as limited as she and Dr. Prince thought, the ALJ found Dr. Cervoni and the functional capacity evaluation to be more persuasive regarding her restrictions. When summarizing the functional capacity evaluation report, the ALJ noted only that the claimant could perform at maximum sustained levels for pushing and pulling at the waist and shoulder levels and that she could lift 20 pounds overhead. The claimant's petition for reconsideration noted the decision's failure to address the evidence of her lack of capacity to perform the repetitive activities that her job required, but the ALJ denied it, stating that the credible restrictions imposed by Dr. Cervoni permitted a return to the type of work performed on the date of injury.

The claimant appealed. She argued that the ALJ erred by failing to

address her post-injury physical capacity to perform the same manner and volume of repetitive work as she performed when she was injured and that nothing refuted the functional capacity report and some of Dr. Prince's findings concerning her deficits in that regard. She asserted that KRS 342.730(1)(c)1 required the ALJ to address specifically her ability to perform the repetitive work her job required. The employer argued that substantial evidence supported the decision, noting that the claimant's job involved no more than light duty and required no significant overhead work. Agreeing with the claimant, the Board vacated the decision and remanded the claim for additional findings. A divided Court of Appeals affirmed.

KRS 342.285(1) designates the ALJ as the finder of fact in a workers' compensation claim, which gives the ALJ the sole authority to judge the credibility of witnesses and weigh conflicting evidence.² The Board's function under KRS 342.285(2) is to determine whether an ALJ's decision is erroneous as a matter of law. When an ALJ fails to address evidence of all factors that are relevant under a statute or legal theory, the Board cannot be certain that the ALJ applied the statute or theory correctly.³ Thus, the claim must be remanded for additional findings and a reconsideration of the merits.

KRS 342.730(1)(c)1 provides a triple income benefit if a work-related injury deprives a worker of the physical capacity to perform "the type of work

² Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

³ Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982).

that the employee performed at the time of injury." The court determined in Ford Motor Co. v. Forman, 142 S.W.3d 141 (Ky. 2004), that the phrase "type of work" refers to the specific jobs or tasks that the worker performed for the defendant-employer at the time of the injury. Thus, evidence of a worker's ability to perform other jobs is irrelevant.⁴ Evidence of a worker's ability to work at a certain demand level is relevant but of limited value.

KRS 342.730(1)(c)1 required the ALJ to analyze the evidence regarding the physical requirements of the job that the claimant performed vis-à-vis her post-injury physical condition and restrictions. Her work consisted of operating a printing jig, which required her to use both of her hands at or above chest level to load 450 parts per hour onto a jig and then apply sufficient force to hold each part in place until it was stamped twice. She also had to be able to operate the jig manually when it malfunctioned.⁵ In either event, the job required her to repeat the stamping process for eight hours per day, five days per week.

The ALJ found the claimant's and Dr. Prince's perception of her abilities not to be credible, choosing instead to rely on Dr. Cervoni and the functional capacity evaluation that Mr. Pound performed. No witness testified that the claimant retained the physical capacity to return to her job on the print jig

⁴ Lowe's #0507 v. Greathouse, 182 S.W.3d 524 (Ky. 2006).

⁵ A November 2004 accident investigation report indicates that the employer had replaced the machine a month earlier, but nothing refutes the claimant's testimony that it was malfunctioning at or about the time her injury occurred, which required her to operate it manually.

machine or refuted her testimony concerning the repetitive nature of the job. Pound stated that she gave maximum and consistent effort during functional capacity testing. Yet, the ALJ failed to address the deficits that he reported in sustained grip strength in the right hand, in the ability to perform repetitive tasks using the right hand and upper extremity, and in the ability to perform repetitive tasks with the fingers of the right hand, deficits that clearly would affect her ability to work as a print jig operator. Moreover, the ALJ failed entirely to address the repetitive nature of the job. The Board did not err in vacating the decision and remanding because it could not determine without further explanation whether the ALJ applied KRS 342.730(1)(c)1 properly.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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