RENDERED: November 21, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000057-WC

BARBARA GIBSON — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-00-66944

PLAID CLOTHING; HON. IRENE STEEN, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, SCHRODER AND TACKETT, JUDGES.

JOHNSON, JUDGE: Barbara Gibson has petitioned for review of an opinion of the Workers' Compensation Board entered on December 11, 2002, which affirmed the Administrative Law Judge's dismissal of her claim. Having concluded that the Board has not committed an error in assessing the evidence so flagrant as to cause gross injustice, we affirm.

Gibson began working for Plaid Clothing in 1977,[1] where she operated a clothing press. According to Gibson, she would receive a completed sport jacket in an assembly line operation, where she would then press the coat several times to remove the wrinkles. Gibson stated that she would manipulate the coat in the machine with her hands, while she used both feet to operate pedals which moved the actual press down onto the jacket. Gibson further stated that she would press each coat at least 16 times before her work on that particular coat was completed. Prior to June 1, 1999, Gibson estimated that she could complete 700 to 800 coats per day.

On or around June 1, 1999, Dominique Gureilla[2] began working at Plaid Clothing in a quality assurance position. According to Gibson, Gureilla would periodically adjust her press by tightening some of the controls. Gibson stated that as a result of this tightening, the height of the pedals that she operated with her feet was raised, and she was forced to exert much more pressure on the controls to operate the machine. Consequently, Gibson stated that the number of coats she could

[1] According to the record, Plaid Clothing was known as Palm Beach when Gibson first began working there in 1977. Plaid Clothing was located in Somerset, Kentucky, and closed in March 2002.

[2] The correct spelling of this person's name is not clear from the record. In its order dismissing Gibson's claim, the ALJ spells this individual's name Domenico Grillo. However, in her brief to this Court, Gibson spells his name Dominique Gureilla.

press in one day was reduced from 700 or 800 to 400 or 500.[3] Gibson testified that she asked Gureilla to stop adjusting the press, but he continued to do so.

Gibson stated that on August 24, 2000, she filled out paperwork to have the controls on the press loosened, but before a mechanic could assist her, she felt a "snap" in her back. Gibson described the pain as a burning sensation in her neck, right shoulder, and lower back. Gibson informed the supervisor of her injury and an accident report was completed. The following day, Gibson went to see Dr. Rodney Oakes, who would be the first of numerous doctors to evaluate Gibson over the next several months.

On March 27, 2001, Gibson filed an application for the resolution of an injury claim with the Department of Workers' Claims, in which she listed an injury date of August 24, 2000.[4] Gibson's application was supported by a medical evaluation from Dr. Magdy El-Kalliny, who opined that Gibson had "signs and symptoms of cervical, thoracic and lumbar sprain/strain accompanied with myofascitis."

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[3] Gibson testified that employees at Plaid were paid according to a formula based on the number of coats that could be processed. Gibson believed that Gureilla adjusted her press to deliberately cut production.

[4] Gibson's original claim was voluntarily dismissed, but was later re-filed on September 26, 2001, with additional claims for psychiatric problems and chronic pain. In her brief before the Board, Gibson conceded that the evidence in the record in support of her claim for psychiatric problems did not compel a decision in her favor.

A benefit review conference was scheduled for February 6, 2002. The contested issues were: (1) the work-relatedness of the alleged injury; (2) whether there had been an "injury" as defined under the workers' compensations statutes, and the extent and duration of any injury; (3) Gibson's ability to return to work; (4) Gibson's entitlement to payment of medical expenses; (5) Plaid Clothing's entitlement to credit for payment of disability benefits; (6) whether Gibson was entitled to continued temporary total disability (TTD) payments; and (7) whether there should be a suspension of benefits for Gibson's failure to appear for an independent medical evaluation.

After a formal hearing was held on June 26, 2002, the ALJ entered an order on August 27, 2002, dismissing Gibson's claims. The ALJ found that Gibson had failed to meet her burden of proof as to her injuries being work-related. Gibson appealed to the Board. On December 11, 2002, after reviewing the evidence that had been presented to the ALJ, the Board stated that it "cannot say as a matter of law [that] Gibson is entitled to TTD or reimbursement or payment for medical expenses other than that already voluntarily paid by Plaid Clothing."[5] This petition for review followed.

[5] Prior to the ALJ's dismissal of Gibson's claim, she received TTD benefits from September 25, 2000, through October 23, 2000, which totaled $651.77. Gibson also received payment for medical expenses in the amount of $1,942.33.

Gibson claims the ALJ erred by dismissing her claim in light of the evidence presented. Specifically, Gibson argues:

> The testimony of Gibson's treating physicians and medical experts overwhelmingly supports the occurrence of injuries related to her job performance and activities culminating on August 24, 2000.
>
> . . .
>
> The evidence compelled a finding of occupational injury and any benefits attached thereto. A finding of occupational injury must be made [and] accompanied by the award of medical benefits.

We disagree and hold that the Board did not err in affirming the ALJ's dismissal of Gibson's claim.

Our standard of review mandates that the ALJ's order or award "shall be conclusive and binding as to all questions of fact, but either party may . . . appeal to the Workers' Compensation Board for the review of the order or award."[6] "The board shall not substitute its judgment for that of the administrative law judge as to the weight of evidence on questions of fact . . . ."[7] The Supreme Court of Kentucky "has construed KRS 342.285 to mean that the fact-finder, rather than the reviewing court, has the sole discretion to determine the

[6] Kentucky Revised Statutes (KRS) 342.285(1).

[7] KRS 342.285(2).

quality, character, and substance of evidence."[8] KRS 342.285 has been further construed to mean that, as fact-finder, the ALJ "may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof[.]"[9] "When the . . . Board reviews the findings of the ALJ, its review is restricted to a determination of whether the factual findings of the trier of fact was 'clearly erroneous.'"[10]

"Although a party may note evidence that would have supported a conclusion that is contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal."[11] The Board does not have the authority to substitute its judgment for that of the ALJ on issues regarding the weight to be afforded to the evidence involving questions of fact.[12] Decisions rendered by the Board are subject to direct review by this Court.[13] "KRS 342.290 limits the scope of review by the

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[8] Burton v. Foster Wheeler Corp., Ky., 72 S.W.3d 925, 929 (2002) (citing Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985)).

[9] Burton, 72 S.W.3d at 929 (citing Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977)).

[10] Union Underwear Co. v. Scearce, Ky., 896 S.W.2d 7, 9 (1995) (citing Hudson v. Owens, Ky., 439 S.W.2d 565, 568 (1969)).

[11] Burton, supra at 929 (citing McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46, 47 (1974)).

[12] KRS 342.285.

[13] Kentucky Rules of Civil Procedure (CR) 76.25(1).

Court of Appeals to that of the Board and also to errors of law arising before the Board."[14]

Gibson, as the claimant in her workers' compensation action, had "the burden of proof and the risk of persuading the [ALJ] in [her] favor."[15] In that Gibson was unsuccessful before the [ALJ], the question is "whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in [her] favor."[16] The Board may only reverse the ALJ's decision "if the evidence presented compelled a finding for [Gibson]."[17] "For the evidence to be compelling, the evidence produced in favor of [Gibson] must be so overwhelming that no reasonable person could reach the conclusion of the [ALJ]."[18] "The function of further review of the [Board] in the Court of Appeals is to correct the Board only where . . . [we] perceive[ ] the Board has overlooked or misconstrued controlling statutes or precedent, or committed an

[14] Burton, 72 S.W.3d at 929.

[15] Snawder v. Stice, Ky.App., 576 S.W.2d 276, 279 (1979) (citing Tackett v. Sizemore Mining Co., Ky., 560 S.W.2d 17 (1977); and Caudill, 560 S.W.2d at 15).

[16] Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735, 736 (1984).

[17] REO Mechanical v. Barnes, Ky.App., 691 S.W.2d 224, 226 (1985).

[18] Id. at 226.

error in assessing the evidence so flagrant as to cause gross injustice."[19]

While Gibson did present evidence which tended to support her claim, Plaid Clothing also introduced evidence to the contrary. This Court will not substitute its judgment regarding the probative value of the evidence for that of the fact-finder. Based on our review of the record, we cannot conclude that the evidence was so overwhelming as to compel a finding in Gibson's favor.

Dr. Daniel Primm, an orthopedic surgeon who evaluated Gibson on December 7, 2000, testified by deposition that in his opinion, Gibson suffered from "mild preexisting degenerative changes," with "symptom exaggeration." In particular, Dr. Primm stated:

> At this point in time, I suspect we now are dealing with either overt symptom exaggeration or some type of psychological overlay. In taking her history today, I was quite impressed with how angry she seemed to be about the supervisor who would not allow the mechanic to adjust her machine. I feel this probably is a significant part of her continued symptoms. At this point, I feel she would be at [maximum medical improvement] in terms of requiring any further former medical or other treatment. I know of no value for continued passive treatments, including the chiropractic manipulations. I think the mainstay of her treatment should be conservative and should

[19] Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

> consist of active exercise centered on aerobic reconditioning. At this point, I feel she could return to work. . . . From an objective standpoint, I really cannot find evidence of a residual injury from the incident that she described occurring at work on [August 24, 2000].

Dr. Primm further stated that he would assign Gibson a 0% impairment rating under the American Medical Association's guidelines, and that there was no objective evidence of an injury that he would attribute to Gibson's work.

Further, Dr. Ellen Ballard evaluated Gibson on October 24, 2000. As part of her evaluation, Dr. Ballard also reviewed Gibson's medical records. In a letter in which Dr. Ballard summarized her findings, she stated:

> [Gibson's] examination is one of atypical musculoskeletal complaints and cannot be specifically related to one incident at work. . . . [Gibson] is at maximum medical improvement and requires no further treatment. [Gibson] has no evidence of impairment related to [the August 24, 2000, incident at work].

Finally, Dr. David Shraberg, a psychiatrist who evaluated Gibson on January 2, 2002, reported the following findings and opinions:

> Thus, after completely normal neurodiagnostic tests and exams, rather than dealing through her [u]nion with the issue of essentially job dissatisfaction and uncertainty regarding her ongoing career at [Plaid Clothing] being addressed, [Gibson] has taken the "physical route" of complaining of chronic pain, making it

> impossible for her to return to work. Thus, she has an extraordinarily disproportionate amount of pain, considering there is an absence of any real injury, as well as [an] absence of objective findings.
>
> Obviously, physically, there is nothing in the records to suggest that she should be in such chronic pain, and it would be both unnecessary and potentially risky (addiction and symptom dependency) to continue on unnecessary chiropractic and pain management. [Gibson's] pain is psychological and has to do with phase of life, as well as what she described as essentially a "pain in the neck" regarding her last supervisor [Gureilla].

Dr. Shraberg went on to opine that Gibson's symptom magnification was "extraordinary." He further stated that Gibson had reached maximum medical improvement, that no further medical treatments were necessary, and that Gibson could return to work.

After weighing all of the evidence, the ALJ dismissed Gibson's claim after concluding that "the more persuasive evidence [had] been presented by [Plaid Clothing]." Thus, while Gibson did introduce a significant amount of evidence in support of her claim, the aforementioned summation of the evidence presented by Plaid Clothing shows that it also introduced a significant amount of evidence rebutting Gibson's claim. Hence, we cannot conclude that the evidence was so overwhelming as to compel a finding in Gibson's favor.

In an attempt to discredit the opinions of the doctors who proffered evidence favorable to Plaid Clothing, Gibson argues that these doctors "misconceived" her claim. According to Gibson, her claim was a "repetitive work injury" that had arisen over time. Thus, Gibson asserts that since Dr. Primm and Dr. Ballard focused their evaluations around the incident occurring on August 24, 2000, their opinion testimony should not have been relied upon by the ALJ. We disagree.

First, we note that there is conflicting evidence in the record as to whether Gibson saw her claim as a repetitive injury claim, or as an isolated incident claim. Dr. Primm testified that when he conducted his examination, Gibson identified August 24, 2000, as the "focal injury date." Moreover, Gibson herself testified that she "didn't have physical injuries" prior to August 24, 2000. Regardless of this fact, however, both Dr. Primm and Dr. Shraberg opined that Gibson's alleged injuries were the result of symptom exaggeration or magnification. Hence, there was sufficient evidence in the record to support the ALJ's finding that Gibson had not suffered a compensable injury which could be attributed to her work.

Based on the foregoing, the opinion of the Worker's Compensation Board affirming the ALJ's dismissal of Gibson's claim is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, PLAID CLOTHING:

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