

RENDERED: AUGUST 27, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2010-CA-000319-WC

SSW HOLDINGS CO./  
COLLIS, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-03-00248

BARBARA BEARD;  
HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE; AND  
THE WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: MOORE AND WINE, JUDGES; HARRIS,<sup>1</sup> SENIOR JUDGE.

MOORE, JUDGE: SSW Holdings Co./Collis Inc. petitions for the review of an  
opinion of the Workers' Compensation Board affirming the decision of an

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<sup>1</sup> Senior Judge William R. Harris, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Administrative Law Judge (ALJ) finding Barbara Beard permanently and totally disabled pursuant to the requirements of Kentucky's Workers' Compensation Act. Finding no error in the decisions of either the ALJ or the Board, we affirm.

### **STATEMENT OF FACTS/PROCEDURAL HISTORY**

Barbara Beard is forty-nine years old, a high school graduate, has some training in cosmetology, but most of her employment has been as a factory worker and forklift driver. On December 10, 2001, Beard suffered an injury to her neck while working for SSW as a forklift driver. She filed a claim for benefits on February 5, 2003, and on March 23, 2004, via interlocutory order, the ALJ found her neck injury to be work-related within the meaning of Kentucky's Workers' Compensation Act. The ALJ awarded Beard temporary income and medical benefits and approved a number of surgeries proposed to treat her condition, including a discectomy and cervical fusion from C3 to C5 recommended by Beard's physician, Dr. Richard T. Holt. The ALJ also held that at the time of the interlocutory opinion, it was too early to determine whether Beard had attained maximum medical improvement from the December 10, 2001 work injury, or to assess Beard's permanent disability arising from it. Accordingly, the ALJ placed the remainder of Beard's claim in abeyance, pending the outcome of Beard's surgeries.

In April of 2004, Beard underwent the surgery recommended by Dr. Holt. Thereafter, Beard continued to report pain in her neck, began to report difficulty swallowing, and complained that she felt as if something was moving in

the areas of her surgery. By February of 2005, Dr. Holt determined that there was a non-union of her fusion, which indicated that her fusion had failed. He recommended repairing the non-union in a second fusion surgery, involving a posterior cervical fusion from C3 to C7. In a July 5, 2005 order, the ALJ approved Beard's request to follow Dr. Holt's recommendation, and, in August of 2005, Dr. Holt performed the surgery. Afterward, Beard complained of posterior cervical pain, suboccipital headaches, an inability to sit without supporting her neck, and numbness and tingling in the fourth and fifth digits of her right hand.

In February of 2005, Beard's claim was taken out of abeyance. Subsequently, Beard underwent further medical examination. SSW and Beard introduced additional medical evidence in the record relating to Beard's condition. But, Beard and SSW did not stipulate the contested issues remaining in this matter until May 20, 2009. On that date, at a benefit review conference, they agreed that the issues for the ALJ to decide were 1) the extent and duration of Beard's work-related injury; and 2) whether any multipliers applied to her award.

A hearing was held with respect to these issues on June 3, 2009. On July 28, 2009, the ALJ entered his opinion and order finding Beard permanently and totally disabled within the meaning of Kentucky Revised Statute (KRS) 342.0011(11)(c). The order itself summarized the evidence that had been filed since the interlocutory opinion and stated that the ALJ had reviewed and considered all of the evidence of record. However, in concluding that Beard was permanently and totally disabled, the order relied entirely upon two sources of

evidence: 1) Beard's testimony; and 2) a KRS 342.315 university evaluation performed on March 21, 2007, by Dr. John E. Harpring. The specifics of Beard's testimony and Dr. Harpring's report are addressed in our analysis as they become relevant.

Following the ALJ's opinion, SSW appealed to the Board, contending first that the ALJ's finding that Beard was totally and permanently disabled was not supported by substantial evidence. Secondly, SSW argued that even if substantial evidence supported the ALJ's opinion, the ALJ was nevertheless required to reduce Beard's award pursuant to KRS 342.035(3). In support of this latter contention, SSW claimed that Beard's treating physicians had warned Beard before and after her April, 2004 surgery that smoking could result in a non-union of her fusion, and that Beard ignored their advice and did indeed smoke before and after that surgery. SSW maintained that Beard's refusal to follow her physicians' advice was a factor in the resulting non-union. However, the Board affirmed the ALJ's opinion and order after concluding that substantial evidence did support the ALJ's decision and that SSW had failed to preserve the issue of KRS 342.035(3) for appellate review. This appeal followed.

### **STANDARD OF LAW**

The ALJ is the finder of fact in workers' compensation matters. *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000). In that regard,

KRS 342.285(2) provides that the Board shall not reweigh the evidence and substitute its judgment for that of the ALJ with regard to a question of fact. The

standard of review with regard to a judicial appeal of an administrative decision is limited to determining whether the decision was erroneous as a matter of law. *American Beauty Homes v. Louisville & Jefferson County Planning & Zoning Commission*, Ky., 379 S.W.2d 450, 457 (1964). Where the ALJ determines that a worker has satisfied his burden of proof with regard to a question of fact, the issue on appeal is whether substantial evidence supported the determination. *Special Fund v. Francis*, Ky., 708 S.W.2d 641, 643 (1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. *Smyzer v. B.F. Goodrich Chemical Co.*, Ky., 474 S.W.2d 367 (1971). Although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. *McCloud v. Beth-Elkhorn Corp.*, Ky., 514 S.W.2d 46 (1974). The crux of the inquiry on appeal is whether the finding which was made is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law. *Special Fund v. Francis*, *supra*, at 643.

*Id.*

## ANALYSIS

On appeal before this Court, SSW primarily repeats the arguments it made before the Board. SSW does not dispute the ALJ's determination that Beard sustained a compensable, work-related injury on December 10, 2001. Rather, SSW's reasons for challenging the ALJ's opinion and the Board's affirmation of that opinion fall into two distinct categories, the first of which involves KRS

342.0011(11)(c), and the second involves KRS 342.035(3).<sup>2</sup> We address each below.

### **KRS 342.0011(11)(c)**

SSW contends that it was error for the ALJ to hold that Beard was permanently and totally disabled within the meaning of KRS 342.0011(11)(c) and that the ALJ should have instead found Beard permanently *and partially* disabled per KRS 342.0011(11)(b). It reasons that Beard failed to demonstrate that she is permanently and totally unable to work as a result of her injury because: 1) every physician who has evaluated Beard has released her to return to work with limitations; 2) Beard offered no vocational testimony to suggest that she was disqualified from performing all types of work; and 3) if Beard is indeed completely and permanently unable to perform any type of work, the ALJ failed to consider whether something other than the December 10, 2001 injury may have caused or contributed to this condition.

Regarding SSW's first contention, we do not agree that the ALJ was precluded from finding Beard totally disabled, per KRS 342.0011(11)(c), simply because every physician who has evaluated Beard has released her to return to work with limitations. In *Hamilton*, 34 S.W.3d 48, the Supreme Court of Kentucky determined the relevant inquiry as to whether a claimant is totally disabled within the meaning of the Workers' Compensation Act:

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<sup>2</sup> SSW also emphasizes that Beard was denied Social Security Disability benefits. However, a social security determination is largely irrelevant to a Kentucky workers' compensation claim because it is made under the requirements of a different statute and by a different agency. *Adams v. NHC Healthcare*, 199 S.W.3d 163, 167 (Ky. 2006).

[D]etermining whether a particular worker has sustained a partial or total occupational disability as defined by KRS 342.0011(11) clearly requires a weighing of the evidence concerning whether the worker will be able to earn an income by providing services on a regular and sustained basis in a competitive economy.

...

An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury.

...

[I]t necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled.

...

It is among the functions of the ALJ to translate the lay and medical evidence into a finding of occupational disability.

*Id.* at 51-2 (internal citations omitted).

The case of *Hamilton* itself involved an award of permanent and total disability benefits in favor of a claimant who had been assigned an impairment rating of 27%. There, the ALJ determined that the claimant was totally disabled in

light of the nature of the claimant's injury (which, according to two of his doctors, prevented him from repetitively bending, stooping, or lifting anything beyond forty pounds, or standing, sitting or walking for more than three hours out of an eight-hour day); the claimant's age and education (he was almost 40 at the time of his injury and had no schooling beyond the 12<sup>th</sup> grade); the claimant's former employment (which, to a great extent, involved only manual labor); and the fact that the claimant did not retain the physical capacity to return to that former employment. *Id.* at 50. In affirming the decision of the ALJ, the Supreme Court held that a finding of permanent and total disability under that analysis was not so unreasonable that it must be viewed as erroneous as a matter of law. *Id.* at 52.

Here, the ALJ weighed the same factors, beginning with the nature of Beard's injury and its effect upon her ability to return to her former employment. In this regard, the ALJ relied upon Beard's testimony that her neck pain and migraines severely limited her day-to-day life. The ALJ also relied upon Dr. Harpring's university evaluation, which neither party impeached; thus, it is entitled to presumptive weight. *See* KRS 342.315; *see also Magic Coal Co. v. Fox*, 19 S.W.3d 88, 94-5 (Ky. 2000). Dr. Harpring's evaluation imposed restrictions upon Beard that included no lifting greater than 5 to 10 pounds and determined that Beard had a 28% impairment rating. Dr. Harpring's evaluation also stated that, within reasonable medical probability, Beard's complaints of posterior cervical pain, migraines, numbness, and her inability to sit without supporting her neck were the result of cervical spondylosis, caused by her work-related injury. He



reasoned that these symptoms arose either from the injury itself, or from the non-union of the fusion at issue in her approved surgery of April of 2004 and the subsequent attempt to repair it. Further, Dr. Harpring's report stated that, due to that pain, Beard "is unable to really look with normal range of motion testing in either direction, and has to support her neck a lot of the times [sic] to decrease her neck pain. Thus, she is severely limited to any type of activity." Likewise, Harpring's evaluation concluded that Beard can never resume her former employment as a factory worker and forklift driver.

As to Beard's age and education, the ALJ stated:

At this time [Beard] is forty-nine years of age. Because any chance of ever returning to work would involve detailed and complex job retraining she would almost certainly be over fifty years of age when she attempted to re-enter the work force. Fifty is not old, it also is not young. At this particular age the undersigned believes age is a neutral factor, not persuasive either way.

[Beard] has a 12<sup>th</sup> grade education and cosmetology training. Certainly this indicates that she does have some skill and can learn new tasks. It is not, however, indicative of a ready made ability to quickly step into any type of sedentary work. It is also not necessarily indicative that she has the capacity to be re-trained, within her restrictions, into any type of regular employment.

With respect to Beard's work history, the ALJ stated:

[Beard's] job history, as a factory worker and fork lift driver indicates that she is more suited, and used to, jobs that she is wholly prohibited from doing now. In short, if she ever were to return to work she would require extensive job re-training.

In light of the above, the ALJ concluded:

Quite frankly the undersigned can think of no job [Beard] has ever done, or any job which has been proven she can be re-trained to do, that would come within her 5-10 pound lifting restrictions. Also, I have found [Beard] to be credible and as Dr. Harpring notes, she is severely limited to any type of activity. I find, based on her restrictions that it is highly unlikely, almost certainly unlikely, that she will ever be able to find gainful, regular employment, within the restrictions assigned by Dr. Harpring. Within the meaning of the Kentucky Workers' Compensation Act the Plaintiff is permanently and totally disabled.

In short, the ALJ's analysis, prior to finding Beard permanently and totally disabled, was based upon the same factors and was roughly identical to the analysis performed in *Hamilton*. As in *Hamilton*, the ALJ's award was an individualized determination which translated Beard's testimony, as well as the medical evidence, into a finding of occupational disability. And, as in *Hamilton*, this Court cannot find the ALJ's conclusion so unreasonable that it must be viewed as erroneous as a matter of law.

Turning to SSW's second argument, we note at the onset that an ALJ is not required to rely upon an expert vocational opinion in order to find a claimant occupationally disabled and that a claimant's own testimony is competent evidence of her physical condition and of her ability to perform various activities both before and after being injured. *Hamilton*, 34 S.W.3d at 52. That said, we disagree with SSW's contention that Beard offered no such testimony. At the June 3, 2009 hearing on this matter, Beard stated that the pain in her neck and resulting

migraines are her most debilitating condition; that she only had migraines and neck pain subsequent to her December 10, 2001 injury; that even riding in a car for an hour is sufficient to trigger migraines and neck pain severe enough to keep her in bed for two days at a time; and that because of her neck pain, the only activity she is able to perform is sitting in a recliner, wearing a neck brace or an ice pack. Beard further testified that she did not believe she could perform, compete for and hold any job at all because of this condition.

Finally, SSW's third argument is without merit. It is true that the ALJ's opinion did not consider several of Beard's allegedly non-work-related conditions, including carpal tunnel, knee problems, hypertension, asthma, arthritis and depression. It is equally true, however, that the ALJ's opinion does not attribute Beard's total and permanent disability to any of these conditions. Instead, the ALJ cited only to Beard's cervical spondylosis as the basis for awarding permanent and total disability benefits; Dr. Harpring opined that her cervical spondylosis resulted from her work-related injury of December 10, 2001, and Beard described the neck pain and migraines caused by this condition as her most disabling symptoms.

### **KRS 342.035(3)**

According to SSW, Beard was told by her doctors that if she did not stop smoking prior to and following her April 21, 2004 surgery, she would not heal properly and would instead aggravate her condition. SSW alleges that Beard nevertheless chose to continue smoking and, as a consequence, her smoking did

indeed prevent her surgery from healing properly and aggravated her condition.

SSW believes that the ALJ should have reduced Beard's award, pursuant to KRS 342.035(3), for what it alleges to be Beard's unreasonable failure to follow competent medical advice.

In this appeal, however, SSW is not contending that the ALJ erred by misapplying KRS 342.035(3). To the contrary, SSW asks this Court to reverse the ALJ because, as it argues, the ALJ erred by altogether failing to make any findings of fact regarding whether Beard's alleged failure to follow competent medical advice aggravated her injury, or any conclusions of law relating to KRS 342.035(3). But, both the administrative regulations promulgated by the Executive Director of the Office of Workers' Claims, as well as the Workers' Compensation Act itself, prohibit this Court from reversing the ALJ on this basis.

With regard to the former, 803 Kentucky Administrative Regulations (KAR) 25:010 § 13(13) and (14) mandate that the parties in a workers' compensation matter shall determine the contested issues at a benefit review conference and that "[o]nly contested issues shall be the subject of further proceedings." In its own review of the ALJ's opinion, the Board noted that SSW had asserted KRS 342.035(3) via a special answer and by raising it as a defense in a medical fee dispute. Nevertheless, the Board found that SSW failed to make KRS 342.035(3) a contested issue before the ALJ because SSW did not list it as such at the benefit review conference, per 803 KAR 25:010 § 13(13) and (14).

SSW now urges this Court to find, in our own review of the ALJ's opinion, that the Board misinterpreted its own regulations and that it did effectively preserve Beard's alleged violation of KRS 342.035(3) as a contested issue. But, this Court is mindful that an administrative agency's interpretation of its own regulations is entitled to great deference. *Sidney Coal Co., Inc. / Clean Energy Mining Co. v. Huffman*, 233 S.W.3d 710, 713-14 (Ky. 2007). And, because we find the Board's interpretation of its own regulations to be reasonable, we likewise conclude that SSW's failure to follow those regulations was fatal to its ability to appeal this matter.

With regard to the latter, KRS 342.281 requires a petition for reconsideration to be filed when an ALJ's order contains a patent error, such as a failure to make findings of fact regarding a contested issue, in order to preserve that error for appeal. *Bullock v. Goodwill Coal Co.*, 214 S.W.3d 890, 893 (Ky. 2007). Here, the ALJ's order made no findings on any issue relating to KRS 342.035(3), and SSW filed no petition for reconsideration requesting the ALJ to do so. Thus, even if SSW had properly followed the regulations and preserved Beard's failure to follow competent medical advice as a contested issue in this matter, SSW's failure to petition the ALJ to reconsider his order and make findings of fact relating to KRS 342.035, pursuant to KRS 342.281, also precludes SSW from citing the ALJ's failure to address KRS 342.035 as a basis of error.

SSW asserts that KRS 342.281 did not require it to file a petition for reconsideration before the ALJ in order to preserve KRS 342.035 as an issue for

appeal. SSW fails to cite any authority in favor of this proposition; additionally, we disagree. The applicability of KRS 342.035 would have depended upon the ALJ's findings relating to three questions of fact, *i.e.*, whether Beard had failed to follow competent medical advice, whether such failure was reasonable, and whether an unreasonable failure to follow competent medical advice had in fact aggravated her disability. *See* KRS 342.035(3); *see also Elmendorf Farms v. Goins*, 593 S.W.2d 81, 83 (Ky. App. 1979); *Fordson Coal Co. v. Palko*, 282 Ky. 397, 138 S.W.2d 456 (1940). When the ALJ's order made no findings relating to these questions, it contained a patent error and it was thus incumbent upon SSW to petition the ALJ to make those findings before beginning the appellate process.

### CONCLUSION

For these reasons, the respective decisions of the ALJ and Worker's Compensation Board are hereby AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

Laurie Goetz Kemp  
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BRIEF FOR APPELLEE:

Jeffrey T. Sampson  
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