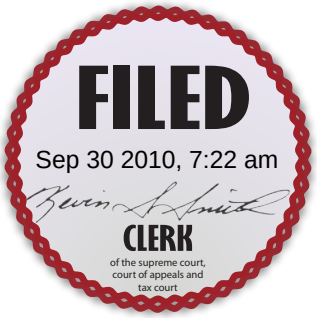

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IN THE
COURT OF APPEALS OF INDIANA

CALCAR QUARRIES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 93A02-1004-EX-397
	)	
DENNIS BLEDSOE,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WORKER'S COMPENSATION BOARD OF INDIANA
The Honorable, Linda P. Hamilton, Chairperson
Cause No. C-195291

September 30, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Calcar Quarries ("Calcar") appeals the decision of the Worker's Compensation Board ("the Board") awarding Dennis Bledsoe worker's compensation benefits. We affirm and remand.

Issues

Calcar raises three issues, which we consolidate and restate as:

I. whether the Board properly determined that Bledsoe was not excluded by the agricultural exception to the Worker's Compensation Act ("the Act"); and

II. whether the Board properly awarded Bledsoe benefits for his shoulder injury.

On cross-appeal Bledsoe raises two issues, which we restate as:

III. whether he is entitled to a 10% increase of his award; and

IV. whether he is entitled to damages and attorney fees under Indiana Appellate Rule 66(E).

Facts

Calcar mines ground limestone and manufactures asphalt products and lime in Paoli. Bledsoe worked for Calcar between 2001 and 2005. Bledsoe returned to his employment at Calcar on February 26, 2008. Bledsoe was employed as a laborer. His duties included driving a truck and operating rock crushing machinery. Bledsoe worked forty hours per week at $10 per hour.

Bledsoe normally expected to work at the quarry. After clocking in at the quarry, Bledsoe and some of his co-workers would occasionally be directed to work at a farm

owned by Calcar or at Calcar's owner's residence. Bledsoe would be transported to the alternative location by a Calcar vehicle. When Bledsoe worked at the owner's residence, he would rake the yard, rake leaves, pull vines off the house, or mow. When he worked at the farm, he would build and repair fences, replace screws in a barn roof, and sometimes work with cattle. Bledsoe remained "on the clock" for Calcar and received the same rate of pay regardless of where he was assigned to work. App. p. 46.

On April 23, 2008, Bledsoe reported to work at the quarry and clocked in. Bledsoe began working in the quarry garage and was eventually sent to work at the farm for the remainder of the day. Upon arrival at the farm, Bledsoe was instructed to move cattle from the barn to a chute for tagging. While the cattle were being prodded for tagging, a co-worker used a shocker on one of the cows, and Bledsoe was injured when the cow fell on him.

Bledsoe suffered "bilateral upper extremity injuries." Id. at 78. Bledsoe was ultimately referred to a surgeon and apparently diagnosed with a torn rotator cuff. After the surgeon attempted more conservative treatment, surgery was recommended. Calcar instructed Bledsoe to get a second opinion and then denied further care. On August 12, 2008, Bledsoe left Calcar's employment "because he was no longer physically able to perform his duties because of his shoulder injury and [Calcar] was doing nothing to address his need for treatment." Id. at 78-79.

In October 2008, Bledsoe filed for benefits under the Act. Calcar claimed that Bledsoe was not entitled to benefits because he was performing agricultural work at the

time of his injury. On January 2, 2009, Calcar filed a motion to dismiss on that basis. On June 30, 2009, a single hearing member concluded:

> 2. . . . the facts of this case overwhelmingly establish [Bledsoe] does not fall within the exception. [Bledsoe] was only episodically assigned to perform duties at other work locations, including the owner's personal residence and at a farm owned by the corporation for which [Bledsoe] worked. [Bledsoe's] employment was clearly as a laborer for a quarry and he was not a farm or agricultural employee.
>
> 3. [Calcar] suggests the Board should apply case law considering dual capacity employment. Plaintiff's employment does not fall within the narrow application of such rule.

Id. at 47-48. The single hearing member denied Calcar's motion to dismiss.

Calcar sought review of that decision by the full Board, which determined Calcar's application for review by the full Board was not ripe. The matter proceeded and, on December 11, 2009, a single hearing member found in part:

> 12. [Calcar] appears to argue that [Bledsoe] actually left employment because he feared a positive drug screen. The evidence in the record does not establish that [Bledsoe] tested positive following the screen. Furthermore, the Single Hearing Member now finds it at least noteworthy that [Bledsoe] was singled out for a drug screen after requesting surgery for the work injury that had occurred nearly four months earlier.
>
> 13. The Single Hearing Member finds [Bledsoe's] testimony[1] as to his reasons for leaving work to be credible and that [Bledsoe] sufficiently establishes his entitlement to temporary total disability benefits beginning August 13, 2008 and continuing until [Calcar] has provided him with treatment

[1] Bledsoe did not testify at the hearing. The single hearing member reviewed Bledsoe's deposition testimony.

> necessary to bring his medical condition to a point of permanence and quiescence.

Id. at 79. The single hearing member awarded Bledsoe worker's compensation benefits for his temporary total disability. Calcar again sought review of the single hearing member's decision by the full Board, which adopted the single hearing member's decisions. Calcar now appeals.

Analysis

We review the Board's decision, not to reweigh the evidence or judge the credibility of witnesses, but only to determine whether substantial evidence, together with any reasonable inferences that flow from such evidence, support the Board's findings and conclusions. Bertoch v. NBD Corp., 813 N.E.2d 1159, 1160 (Ind. 2004). "The Board's conclusions of law are reviewed de novo." Id. Where a single hearing member enters written findings and the Board adopts that decision, such adoption is sufficient to attribute to the Board the explicit written findings of the single hearing member and to permit appellate review accordingly. Rocky River Farms, Inc. v. Porter, 925 N.E.2d 496, 498 (Ind. Ct. App. 2010), trans. denied.

I. Agricultural Exception[2]

Indiana Code Section 22-3-2-9(a) precludes farm or agricultural workers from receiving worker's compensation benefits for work-related injuries. Id. Whether a worker is or is not a farm or agricultural employee must be determined from the character

[2] Calcar frames the standard of review for this issue as the same as our review of an Indiana Trial Rule 12(B)(1) motion to dismiss for lack of subject matter jurisdiction. Regardless of whether we apply that standard of review, the outcome remains the same.

of the work he or she is required to perform and not from the general occupation or business of the employer. Id. "In making such a determination, the whole character of the employment must be considered." Id.

> [A]lthough the character of the 'employment' of an employee must be determined from the 'whole character' of his employment and not upon the particular work he is performing at the time of his injury, nevertheless the coverage of an employee under the Act is dependent upon the character of the work he is hired to perform and not upon the nature and scope of his employer's business.

H. J. Heinz Co. v. Chavez, 236 Ind. 400, 407, 140 N.E.2d 500, 504 (1957). "And while the whole character of the employment must be looked to, an employee may work in a dual capacity for the same employer and be covered by the Act while engaged in one capacity and excluded from its benefits while engaged in the other." Smart v. Hardesty, 238 Ind. 218, 220-21, 149 N.E.2d 547, 549 (1958).

Calcar specifically argues that because Bledsoe was primarily a quarry laborer who performed some agricultural work, "he constituted a 'dual capacity employee' whose entitlement to worker's compensation benefits is contingent upon the type of work he was performing at the time of the injury." Appellant's Reply Br. pp. 1-2. On rehearing in Gerlach v. Woodke, 886 N.E.2d 41, 43 (Ind. Ct. App. 2008), we explained, "the dual capacity exception simply provides an alternative rule in close cases where the employee's work is roughly divided between farm and non-farm work, and it is therefore difficult to determine whether the 'whole character' of the work performed is farm or agricultural."

Like the Board, we do not believe Bledsoe worked in a dual capacity. Bledsoe was hired to work at the quarry and was paid accordingly. His expectation was to work at the quarry and only after clocking in would he occasionally be directed to work elsewhere. Even when he worked at the residence or on the farm, he usually performed maintenance work. Bledsoe testified in his deposition that he had previously herded cattle at the farm "once or twice." Tr. p. 52. The fact that Bledsoe worked with cattle occasionally over a period of years does not mean that he worked in a dual capacity for Calcar. Given these facts, the Board properly concluded that Bledsoe was employed as a laborer for purposes of the Act.

II. Benefits[3]

Calcar argues, "there is no medical evidence to suggest that the rotator cuff tear was caused by the incident with the cattle, as opposed to Mr. Bledsoe having a pre-existing rotating [sic] cuff tear for which he sought treatment less than one month before the incident with the cattle." Appellant's Br. p. 11. Calcar recognizes, however, that the Board's factual findings may not be disturbed unless the evidence at issue is undisputed and leads inescapably to a contrary conclusion. See Gerlach v. Woodke, 881 N.E.2d 1006, 1008 (Ind. Ct. App. 2008), clarified on reh'g, 886 N.E.2d 41, trans. denied.

Although Bledsoe did seek medical treatment for his shoulder prior to the accident, there is also evidence that Bledsoe was treated in the emergency room after the accident and that he sought follow-up care in June 2008, during which the rotator cuff

[3] Calcar asserts that because Bledsoe did not respond to the causation or drug screen arguments in his appellee's brief, we should review the arguments for prima facie error. See Khaja v. Khan, 902 N.E.2d 857, 868 (Ind. Ct. App. 2009). Even when applying this standard, Calcar's arguments are unavailing.

tear was diagnosed. Bledsoe testified that he had previously sought medical treatment for his shoulder because he "slept on it wrong and it was sore." Tr. p. 75. He stated that he was not taking medication for it at the time of the April 23, 2008 accident because it was "all cleared up by then." Id. at 77. Calcar's argument is a request for us to reweigh the evidence, which we cannot do. See Wright Tree Service v. Hernandez, 907 N.E.2d 183, 189 (Ind. Ct. App. 2009), trans. denied.

Calcar also argues that Bledsoe is not entitled to benefits because he quit his employment in anticipation of failing a random drug screen conducted by Calcar. Calcar concedes that the results of the drug screen it conducted on August 12, 2008, are not in the record and bases its argument on a drug screen taken ten days after Bledsoe quit when he sought medical treatment at a hospital for a severe headache. The August 22, 2008 drug screen was positive for marijuana.

The Board's findings do not support Calcar's argument. Specifically, the Board found, "The evidence in the record does not establish that Plaintiff tested positive following that screen." App. p. 79. The Board also found that Bledsoe left his employment with Calcar "because he was no longer physically able to perform his duties because of his shoulder problem and [Calcar] was doing nothing to address his need for treatment." Id. at 78-79. The Board also specifically found Bledsoe's "testimony as to his reasons for leaving work to be credible . . . ." Id. at 79. Calcar's argument as to why Bledsoe quit is based on mere speculation and amounts nothing more than a request to reweigh the evidence, which we cannot do.

III. 10% Increase

On cross-appeal, Bledsoe argues that he is entitled to a 10% increase in his award pursuant to Indiana Code Section 22-3-4-8(f), which provides, "An award of the full board affirmed on appeal, by the employer, shall be increased thereby five percent (5%), and by order of the court may be increased ten percent (10%)." This statute explicitly requires us to increase the award by five percent if affirmed, and gives us discretion to increase the award an additional five percent. DePuy, Inc. v. Farmer, 847 N.E.2d 160, 171 (Ind. 2006). We have previously observed that in the absence of substantive or procedural bad faith or an extensive delay, a claimant's award should only be increased by the statutorily required 5%. Wholesalers, Inc. v. Hobson, 874 N.E.2d 622, 628 (Ind. Ct. App. 2008).

Although Calcar was not successful in its appeal and Bledsoe's award shall be increased by the statutory rate of 5%, we cannot say that the appeal was pursued in bad faith. Nor can we conclude that it resulted in an extensive delay given that less than two years have passed since Bledsoe first applied for worker's compensation benefits on October 21, 2008. Cf. DePuy, 847 N.E.2d at 172 (concluding that 10% increase was warranted where employee's injuries "were incurred over a decade ago, and he has yet to receive any worker's compensation benefit. This delay is nearly twice the time consumed by most cases from injury to final determination on appeal."). We decline to increase Bledsoe's award by 10%.

IV. Indiana Appellate Rule 66(E)

Bledsoe also argues that he is entitled to damages and attorney fees pursuant to Indiana Appellate Rule 66(E), which provides in part, "The Court may assess damages if

an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees." Our discretion to award attorney fees under this rule is limited to circumstances when the appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay. Wholesalers, 874 N.E.2d at 627. Although this rule provides us with discretionary authority to award damages on appeal, we must use extreme restraint when exercising this power because of the potential chilling effect upon the exercise of the right to appeal. Thacker v. Wentzel, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003).

Requests for awards of appellate attorney fees have been categorized as "procedural," for flagrant violations of appellate procedure, and "substantive," for appellate arguments that are utterly devoid of all plausibility. Wholesalers, 874 N.E.2d at 627. Bledsoe requests damages for Calcar's substantive bad faith and argues that to exclude him from worker's compensation benefits rewards Calcar for the "unlawful misappropriation" of its employees. Appellee's Br. p. 20. Although Calcar's arguments on appeal are unavailing, we cannot conclude that they were utterly devoid of all plausibility so as to warrant an award of damages or attorney fees to Bledsoe. We decline Bledsoe's request for damages and attorney fees based on this Rule.

Conclusion

Bledsoe was not a dual capacity employee for purposes of the Act. Further, Calcar's challenges to cause of Bledsoe's injury and his reason for quitting are requests to reweigh the evidence, which we cannot do. Nevertheless, we cannot conclude that Bledsoe is entitled to a 10% increase in his award or to damages and attorney fees

pursuant to Indiana Appellate Rule 66(E). Bledsoe is only entitled to the statutory 5% increase in his award. We affirm and remand for implementation of that increase.

Affirmed and remanded.

FRIEDLANDER, J., and CRONE, J., concur.