RENDERED: November 25, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000132-WC

PEPSI COLA OF CORBIN — APPELLANT

v. — PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. 95-36386

PAUL BARTON; ROBERT WHITTAKER,
Acting Director of SPECIAL FUND;
RICHARD H. CAMPBELL, JR.,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD — APPELLEES

and

NO. 1998-CA-000139-WC

ROBERT L. WHITTAKER,
Acting Director of SPECIAL FUND — APPELLANT

v. — PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. 95-36386

PAUL BARTON; PEPSI COLA OF CORBIN;
RICHARD H. CAMPBELL, JR.,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION

AFFIRMING

** ** ** ** ** ** **

BEFORE: DYCHE, EMBERTON and HUDDLESTON, Judges.

HUDDLESTON, Judge. Pepsi Cola of Corbin and the Special Fund appeal from an order of the Workers' Compensation Board that affirmed an Administrative Law Judge's determination that a back

injury Paul Barton received on January 30, 1992, was work-related.

Paul Barton, who was born on October 30, 1951, worked for Pepsi Cola from April 1973 through August 1995. As an employee for Pepsi Cola, Barton worked in a number of capacities such as laborer, inventory clerk, route driver, loading crew supervisor and tractor-trailer driver. On January 30, 1992, while driving Pepsi Cola's tractor-trailer along Interstate Highway 75 north of the Tennessee-Kentucky border, Barton struck and killed a deer. He stopped and removed the deer from the underside of the vehicle and dragged it to the side of the highway. Because the deer's carcass was intact, Barton decided to field dress the deer. As he was bending down to do so he felt an excruciating pain in his lower back.[1] Barton received chiropractic treatment for the injury and missed some six weeks of work. Barton submitted a claim for this injury, but Pepsi Cola's compensation carrier determined that the injury was not work-related.

On August 8, 1995, Barton injured his cervical spine as he was cranking a loaded trailer's dolly gears that were "messed up." Barton initially received chiropractic treatment for the injury. Eventually a neurosurgeon determined that it was necessary to perform an anterior cervical diskectomy and fusion upon Barton. Despite this treatment, Barton has continued to suffer

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[1] Barton noted that field dressing a deer requires no great exertion, but simply requires cutting open the deer's underside and letting its entrails roll out.

from constant pain and depression. On September 10, 1996, Barton filed for workers' compensation disability benefits for the August 8, 1995, injury. On July 31, 1997, the ALJ determined that Barton is totally and permanently occupationally disabled. The ALJ also determined that 60% of Barton's disability is attributable to the August 1995 injury and 40% to the January 1992 injury. Because the ALJ designated the prior injury as pre-existing and active it was noncompensable within the instant claim. However, he adjudged the prior injury to be sufficiently work-related (notwithstanding that Barton had never filed a claim) and thus a basis for invoking the principle of Teledyne-Wirz v. Willhite, Ky. App., 710 S.W.2d 858 (1986), to enhance the amount and duration of the benefits payable for plaintiff's 60% compensable permanent occupational disability, in accordance with Ky. Rev. Stat. (KRS) 342.730(1)(a).

Pepsi Cola and the Special Fund contend that the ALJ wrongly determined that Barton's 1992 back injury was work-related. Since the Board affirmed the ALJ's decision, it is necessary to state the standard of review as to both. As was explained in Western Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992), this Court is to correct a decision of the Board only where it has assessed the evidence so flagrantly as to cause a gross injustice. Likewise, under KRS 342.285(2)(d), the Board shall not substitute its judgment for that of the administrative law judge as to the weight of evidence on questions of fact, the Board's review being limited to determining whether or not the

decision is clearly erroneous on the basis of the reliable, probative and material evidence contained in the whole record.

Furthermore, this Court may not disturb a fact finder's factual determination if there is any substantial evidence to support it. Yocum v. Harvey, Ky., 578 S.W.2d 52, 53 (1970). No single factor should be given conclusive weight in determining whether an injury is work-related. The determination as to whether or not an injury was work-related is based upon the aggregate of facts rather than the existence or non-existence of any particular factor. Beale v. Hammons, Ky. App., 804 S.W.2d 13 (1990).

In the present case, the ALJ noted that Barton had engaged in strenuous physical activity in removing the deer carcass from underneath the tractor-trailer. Having completed this physical activity, Barton decided to field dress the deer in anticipation of later retrieval. According to the ALJ, the field dressing of the deer was "nothing more than the final event in a series of occurrences which emanated from the work in which plaintiff engaged as an employee of the defendant-employer." The ALJ found that "[a]s he 'bent down' to begin that process, plaintiff experienced severe back pain, the first manifestation of the injury he suffered that day."

After a review of the record, we conclude that the ALJ relied upon substantial evidence in determining that Barton's 1992 injury was work-related. Furthermore, since that injury was pre-existing and active, his decision to enhance the amount and

duration of benefits pursuant to KRS 342.730(1)(a) was correct as a matter of law.

Accordingly, the Board's affirmation of the ALJ's determination that Barton's 1992 injury was work-related is affirmed.

ALL CONCUR.

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