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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001807-WC

BERNARD BAKER APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 02-WC-65861

WAL-MART STORES; HON. R. SCOTT
BORDERS, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON AND McANULTY, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

JOHNSON, JUDGE: Bernard Baker has petitioned for review of an opinion of the Workers' Compensation Board entered on August 6, 2004, which affirmed the Administrative Law Judge's award of permanent partial disability benefits for a back injury Baker sustained while working as a meat cutter for Wal-Mart Stores. Having concluded that the Board did not overlook or misconstrue

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

controlling statutes or precedent or commit an error in assessing the evidence so flagrant as to cause a gross injustice by affirming the ALJ's refusal to enhance Baker's benefits by the multipliers contained in KRS 342.730(1)(c)1, and (1)(c)3, we affirm.

Baker, who was born on December 19, 1960, has a tenth grade education. He began working for the Wal-Mart Super Center in Shelbyville, Kentucky, in May 1998.[2] At the time of the injury, Baker was employed in the meat department where his duties included cutting meat with saws and knives, stocking the meat cases, assisting customers, unloading trucks, lifting meat and boxes weighing up to 100 pounds, and cleaning and organizing the meat department. These tasks involved repetitive pushing, pulling and bending activities, and prolonged standing. His hourly wage at the time of his injury was $13.68, his average weekly wage was $489.33, and he worked approximately 40 hours per week.

On October 27, 2002, Baker slipped on some "ice buildup" inside a walk-in cooler as he was attempting to replace a box of frozen food and fell on his buttocks, injuring his low

[2] Baker's career history included working as a farm hand and meat cutter. He was originally hired by Wal-Mart as a sales associate, then reassigned as a meat cutter. Baker also worked at Robertson's Country Hams for approximately 16 hours per week from 2001 until the injury.

back.[3] Baker's supervisor witnessed the fall and helped Baker get off the floor. Baker immediately went to the emergency room at Jewish Hospital and initially missed four days of work.

Following his emergency room visit, Baker began to receive treatment from Wal-Mart's company doctors, Dr. Waldridge and Dr. Powers. Wal-Mart referred Baker to Dr. Ellen Ballard for an independent medical examination. Due to increased pain, Baker saw Dr. Stacie Grossfield,[4] from November 2002 until February 2003, and she performed an MRI, and ordered physical therapy and medications during this time of treatment.

Baker returned to work at Wal-Mart performing light duty tasks on December 26, 2002, but his pain continued to worsen, and he was off work for approximately six weeks. Baker began treatment with Dr. Mark Myers in April 2003. Dr. Myers reviewed Baker's MRI and found he had disk degeneration at L4-5 and L5-S1 and a bulge at the L4-5 level. Baker returned to Dr. Myers in May 2003 with complaints of severe back pain, severe leg pain, fatigue, and trouble lifting. Dr. Myers opined that Baker's pain was entirely due to his work-related injury. Baker then took leave from work on May 25, 2003, and underwent a lumbar fusion performed by Dr. Myers on May 27, 2003.

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[3] Baker denies having any previous back injuries, despite some conflicting evidence from 1998 through 2000.

[4] Baker saw Dr. Grossfield for a second opinion.

Baker saw Dr. S. Pearson Auerbach, as his own independent medical examiner, at the Medical Assessment Clinic on September 18, 2003. After reviewing Baker's medical records and prior X-rays, and conducting a physical exam, Dr. Auerbach concluded that Baker had "first-degree spondylotisthesis and had an injury, which aggravated the area and required stabilization and fusion."

When Baker returned to work at Wal-Mart on August 31, 2003,[5] he was unable to return to his position as a meat cutter. Rather, Wal-Mart accommodated him, and he worked as a cashier in the electronics section and in the lawn and garden section of the store. As a cashier, he no longer had to perform heavy lifting or bending. Baker's wages as a cashier were $14.19[6] per hour, which he admitted was more money than he was earning at the time of his injury; however, he is only working a 40-hour week[7] as Wal-Mart does not normally allow any employees overtime. However, Baker testified that if it were offered to him, he would try to work overtime. After the injury, Baker did not return to work at his part-time job at Robertson's Country Hams.

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[5] Baker received short-term disability benefits during this period of temporary total disability through a private plan that he had purchased.

[6] This was also the wage for his former position as meat cutter at the time he returned to work.

[7] This may include some overtime because a full-time position at Wal-Mart was for approximately 32 to 38 hours per week.

On June 12, 2003, Baker filed an application for benefits as a result of the October 27, 2002, injury. A hearing was held before the ALJ on December 3, 2003. Baker testified that the surgery had relieved the pain in his legs, but he still had light pain, or an ache, in his back. He further testified that prolonged standing, lifting, and bending increased his symptoms. He currently takes Risperadol regularly for depression and Ultram for pain in his feet, both of which were prescribed to him prior to the injury.

Baker also introduced the report of Dr. Auerbach, who noted that Baker would not likely be able to return to any type of work that required heavy lifting or bending and was medically unable to return to his previous work as a meat cutter. Dr. Auerbach assigned Baker a 20% permanent impairment rating under the AMA Guides to the Evaluation of Permanent Impairment to the body as a whole and placed restrictions on Baker.[8] Wal-Mart introduced the report of Dr. Ballard, who agreed with Dr. Auerbach's rating of 20% permanent impairment, and that Baker was medically unable to return to work as a meat cutter.

[8] Dr. Auerbach recommended the following restrictions: maximum occasional lift of 30 pounds; maximum frequent lift of 10 pounds; maximum occasional carry of 20 pounds; and maximum frequent carry of 10 pounds; avoid lifting from the ground to the knees, waist or above the shoulder; avoid bending/crawling activities; and limit twisting/turning, standing and kneeling activities.

However, she noted that Baker could continue to work within his restrictions.[9]

The ALJ entered his opinion and award on February 5, 2004, limiting Baker's benefits to those provided in KRS 342.730(1)(b). The ALJ found that Baker had a 20% functional impairment rating as a result of his work-related back injury and the subsequent surgery, which he found was reasonable and necessary and a direct result of the work-related injury. He awarded Baker temporary total disability benefits in the amount of $326.23 per week from October 27, 2002, until August 31, 2003, permanent partial disability benefits in the amount of $65.24 per week beginning September 1, 2003, for 425 total weeks, and payment of his medical bills. The ALJ determined that Baker lacked the physical capacity to return to the type of work he was performing at the time of his injury, but he stated that Baker could continue earning wages in the foreseeable future that exceeded the wages he was earning at the time of his injury, and refused to utilize multipliers as indicated in KRS 342.730(1)(c)1 and (1)(c)3 in setting Baker's award.

The ALJ stated as follows:

> In this instance, the Administrative Law Judge is convinced the Plaintiff cannot work as a butcher, the evidence however does not indicate the Plaintiff is unlikely to be

[9] Dr. Ballard did not believe the May 2003 surgery was necessary. She also testified that she believed Baker had a history of chronic back pain.

> able to continue earning a wage that exceeds the wage at the time of injury for the indefinite future.
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> Therefore, the Administrative Law Judge is simply not convinced the Plaintiff is entitled to the 3.2 multiplier. There is simply no evidence in this claim whatsoever to show that the Plaintiff is not capable of working as a cashier for Wal Mart and will be so capable into the future.
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> In fact, the Plaintiff testified while he is not getting overtime hours, he stated nobody in the store gets overtime hours. He did admit, however, if they would offer it to him, he would try to perform the work, which is an indication to the Administrative Law Judge that the Plaintiff should be able to keep this job at an equal or greater wage into the foreseeable future.

Baker filed a petition for reconsideration of the ALJ's award on February 9, 2004, which was denied by the ALJ by order entered on March 5, 2004. Baker then appealed the award to the Board on March 19, 2004, which affirmed the ALJ's award in its entirety by opinion entered on August 6, 2004. This petition for review followed.

"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" [citations omitted].[10] The burden of proof in a worker's compensation claim falls on the employee, who must prove every

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[10] Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48, 52 (Ky. 2000).

element of the claim.[11] Because the ALJ decision was not in favor of Baker, the issue on appeal is "whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in [Baker's] favor."[12] Compelling evidence is such "that no reasonable person could reach the conclusion of the [ALJ]"[13]

The ALJ acts as the finder of fact in all workers' compensation cases, and he, not the Board nor this Court, "has the authority to determine the quality, character, . . . substance, . . ."[14] and weight of the evidence.[15] 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."[16] This Court

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[11] Magic Coal Co. v. Fox, 19 S.W.3d 88, 96 (Ky. 2000).

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

[13] R.E.O. Mechanical v. Barnes, 691 S.W.2d 224, 226 (Ky.App. 1985). See also Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986)(holding "[i]f the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater").

[14] Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418, 419 (Ky. 1985).

[15] Miller v. East Kentucky Beverage/PepsiCo., Inc., 951 S.W.2d 329, 331 (Ky. 1997). See also Magic Coal Co., 19 S.W.3d at 96 (citing McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974)).

[16] Magic Coal Co., 19 S.W.3d at 96 (citing Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977)). See also Ira A. Watson, 34 S.W.3d at 52, (holding that mere evidence contrary to the ALJ's decision is not adequate to justify reversal).

cannot "substitute its judgment" for that of the ALJ's, nor can this Court "render[ ] its own findings" [citations omitted].[17]

If the ALJ's findings of fact were supported by substantial evidence, this Court is bound by them.[18] Substantial evidence has been defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable [people]" [citation omitted].[19] It is well-established that the function of this Court in reviewing the Board "is to correct the Board only where the [ ] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice."[20]

Baker's sole issue on appeal is that the ALJ committed reversible error by refusing to award him the appropriate benefits pursuant to KRS 342.730(1)(c), instead of KRS 342.730(1)(b).[21] KRS 342.730, sections (1)(c)1 through (1)(c)3 provide, in pertinent part, as follows:

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[17] Wolf Creek Collieries, 673 S.W.2d at 736.

[18] Id. See also Addington Resources, Inc. v. Perkins, 947 S.W.2d 421, 423 (Ky.App. 1997).

[19] Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367, 369 (Ky.App. 1971).

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

[21] KRS 342.730 (1) (b) provides, based on Baker's AMA impairment of 20%, that to determine his permanent partial disability, it is proper to take 66 2/3% of his average weekly wage multiplied by a factor of 1.0.

1. If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments; or

2. If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that temporary employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments.

3. Recognizing that limited education and advancing age impact an employee's post-injury earning capacity, an education and age factor, when applicable, shall be added to the income benefit multiplier set forth in paragraph (c)1. of this subsection. If at the time of injury . . . the employee had less than twelve (12) years of education or a high school General Education Development diploma, the multiplier shall be increased by two-tenths (0.2)[.]

In Fawbush v. Gwinn,[22] our Supreme Court interpreted this statute by concluding that the Legislature by inserting the word "or" between subsections (1)(c)1 and (1)(c)2 in the 2000 amendment to KRS 342.730 "evinced an intent for only one of the provisions to be applied to a particular claim."[23] The Supreme Court further held that neither subsection "takes precedence over the other . . . [and] that an ALJ is authorized to determine which provision is more appropriate on the facts."[24]

Baker argues that the ALJ failed to make an appropriate analysis of the statutory language regarding the multipliers. He argues that a claimant should neither be denied an award based on the 3 multiplier of KRS 342.730(1)(c)2 nor the .2 multiplier of (1)(c)3, because he returned to work for the same or greater wages, nor should a claimant's benefits be limited to the provisions of KRS 342.730(1)(b) because he returned to work for the same employer.

In comparing this case to Fawbush, we note that the injured worker in both cases lacked the physical capacity to return to the type of work he performed at the time of the injury and both returned to work at a wage equal to or greater

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[22] 103 S.W.3d 5 (Ky. 2003).

[23] Fawbush, 103 S.W.3d at 12 (citing Whitley County Board of Education v. Meadors, 444 S.W.2d 890 (Ky. 1969)).

[24] Id. See also Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 211 (Ky. 2003).

than his average weekly wage at the time of the injury. However, the two cases are distinguishable factually on a very important point. In Fawbush, there was a question as to whether the claimant would be able to continue to earn a wage that equaled or exceeded his pre-injury wage indefinitely. The Supreme Court in Fawbush stated:

> Furthermore, although he was able to earn more money than at the time of his injury, his unrebutted testimony indicated that the post-injury work was done out of necessity, was outside his medical restrictions, and was possible only when he took more narcotic pain medication than prescribed. It is apparent, therefore, that he was not likely to be able to maintain the employment indefinitely.[25]

The case before us is clearly distinguishable since the ALJ made extensive findings that Baker had been accommodated by Wal-Mart, had returned to work within his restrictions, and was willing to work overtime if it were offered.[26] Based on these factors, the ALJ concluded that there was no reason that Baker could not continue working for Wal-Mart as a cashier earning those same or greater wages for the indefinite future.[27]

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[25] Fawbush, 103 S.W.3d 12.

[26] See Kentucky River Enterprises, Inc., 107 S.W.3d at 211 (stating that "[w]hat remains to be decided, however, is whether he is able to work at least the same number of hours as before the injury, and, therefore, to earn an average weekly wage that equals or exceeds his average weekly wage at the time of his injury" [citations omitted]).

[27] This reasoning falls in line with the holding in Adkins v. Pike County Board of Education, 141 S.W.3d 387, 390 (Ky.App. 2004)(holding that an ALJ must determine whether a claimant "[w]as likely to be able to continue

The ALJ considered both subsections (1)(c)1 and (1)(c)2, and chose subsection (1)(c)2 of KRS 342.730, which provides that when the claimant returns to work at the same or greater wage, the benefits "shall be determined under paragraph (b) of this subsection." The ALJ's opinion devoted two pages to this election not to use the multiplier and the findings are sufficient to justify that decision.

The Board in its August 6, 2004 opinion stated,

> Absent some testimony or other evidence that Baker would be unlikely to be able to continue in some employment at the same or greater wage, we cannot say the ALJ's finding is unreasonable. The evidence cited by the ALJ in reaching his determination is substantial evidence that supports a finding that Baker could continue to earn a wage that equals or exceeds his pre-injury wages.

Thus, Baker failed in meeting his burden of proof to justify the use of the multipliers.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ched Jennings
Louisville, Kentucky

BRIEF FOR APPELLEE, WAL-MART STORES, INC.:

David L. Murphy
Louisville, Kentucky

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earning a wage that equals or exceeds the wage at the time of his injuries for the indefinite future").