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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001101-WC

BARTON HOUSE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-00837

INDIGO BISTRO & BAR;
HON. IRENE STEEN, ADMINISTRATIVE
LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEE

AND: NO. 2004-CA-001236-WC

INDIGO BISTRO & BAR

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-00837

BARTON HOUSE;
HON. IRENE STEEN, ADMINISTRATIVE
LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: HENRY AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.¹

HENRY, JUDGE: David Lee Wright, Sr., is a former employee of both Barton House and Indigo Bistro & Bar (Indigo). Although Wright was initially named as a party to both appeals, the matters at issue here do not concern him directly, and his motion to be dismissed as a party was granted. Barton House appeals, and Indigo cross-appeals from a decision of the Workers' Compensation Board regarding Wright's benefits resulting from work-related injuries. We affirm.

Wright first worked for Barton House, a residential retirement community, as a cook and server. In August, 2000, Wright injured his lower back while helping move a resident. Wright had an average weekly wage (AWW) of \$240.00 at the time of the injury. Barton House paid temporary total disability (TTD) benefits and medical expenses for this original injury. Wright was medically released to return to work after his injury at Barton House, but was restricted to lifting 20 pounds or less. Soon thereafter Wright left his employment at Barton House and completed truck driving school. He worked briefly as an over-the-road trucker, then found employment as a sous-chef, and later executive chef, with Indigo Bistro & Bar, making substantially more money than he had while at Barton House.

¹ Senior Judge Thomas E. Emberton, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

While working for Indigo, Wright again injured his back lifting a heavy box of frozen meat in May, 2001. When Wright had not returned to work a week after the injury his employment was terminated. He then filed a claim for Workers' Compensation benefits.

Administrative Law Judge (ALJ) Irene Steen found that Wright had been employed by Indigo at the time of the injury, but held both employers responsible. The ALJ apportioned the medical expenses equally between Barton House and Indigo, based on medical opinions in the record indicating that both prior injuries contributed to Wright's condition and disability rating. While she found that there were no outstanding TTD benefits due from the Barton House injury itself, the ALJ assigned liability for one-half of Wright's TTD benefits resulting from the Indigo injury to each employer. The ALJ used Wright's AWW of \$703.84 from his employment at Indigo in her calculation, rather than reconciling it with the earlier AWW of \$240.00 from Barton House. The ALJ also found that Wright had suffered a permanent partial disability (PPD) and calculated Wright's benefit, which she also apportioned equally between both employers.

Indigo originally appealed the ALJ's calculation of PPD benefits, but after the parties filed their notices of appeal to the Workers' Compensation Board, Indigo settled its

liability for permanent income benefits with Wright for a lump sum, and the ALJ approved the settlement, rendering the argument moot. In its remaining argument to the Board Indigo asked the Board to remand to the ALJ for findings and specific directions as to how the medical expense apportionment should be done, including who will be responsible for completing forms and records and how liability is to be shared between the parties. In its cross-appeal Barton House asked the Board to overturn the apportionment of medical expenses and TTD, but did not appeal the ALJ's decision regarding PPD. Alternatively, Barton House argued that if TTD benefits are apportioned, the AWW used in the calculation should be amended to reflect Wright's lower AWW while employed at Barton House. The Board upheld the apportionment of medical expenses, citing Sears Roebuck & Company v. Dennis, 131 S.W.3d 351 (Ky.App. 2004), but reversed the apportionment of TTD benefits, holding that they are the responsibility only of Indigo. The Board also declined to direct the ALJ to make specific findings on how the medical expenses should be administered between the parties.

Barton House appealed to this court on very limited grounds, asking only that we remand to the Board with directions to remand to the ALJ for an order requiring Indigo to reimburse Barton House for TTD payments made as a result of the ALJ's erroneous ruling. In a footnote in its brief Barton House notes

that “[u]nfortunately, 803 KAR² 25:010, §29³(15)(b)(sic) forbids motions for reconsideration before the Board. Therefore, Barton could not request the Board to address this oversight”. Barton House notes that the ALJ entered an agreed order, signed by counsel for the parties, which provided that if it was ultimately determined that reimbursement was necessary between the parties and their insurance carriers, such reimbursement would be ordered. Indigo, in its brief, acknowledges the agreement and agrees to honor it “without requiring an enforcement action in circuit court” if the final ruling requires Indigo to pay all of the TTD benefits.

On cross-appeal, Indigo asks that we reverse the Board’s ruling assigning Indigo full responsibility for payment of TTD benefits, and that we direct the Board to order the ALJ to give specific directions as to how the apportionment of medical expenses is to be done. We address the cross-appeal first.

Our role in reviewing decisions of the Workers’ Compensation Board is to correct the Board only when we perceive that it has overlooked or misconstrued controlling law, or committed an error in assessing the evidence so flagrant as to cause gross injustice. Wal-Mart v. Southers, 152 S.W.3d 242,

² Kentucky Administrative Regulations.

³ The correct section number is 21.

245 (Ky.App. 2004), Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992).

Indigo argues that Barton House should be responsible for all of Wright's TTD, or at least for a substantial part of it, because evidence exists that all of Wright's disability is due to his Barton House injury. The factual underpinning for this claim is primarily the report of Dr. David Changaris, an orthopedic surgeon who examined Wright on May 10, 2001, two weeks before the Indigo injury. According to Indigo, Dr. Changaris diagnosed a herniated disc at L5-S1 at that time. Indigo claims that the Board "wholly ignore[d]" Dr. Changaris' report. Yet we note that in Indigo's brief to the Board at page 11, counsel for Indigo admitted that although he felt that he had presented "exceedingly persuasive" evidence in support of his positions before the ALJ, "we have not appealed those issues, because the standard of review does not allow the Board to reverse the ALJ in this situation. The ALJ has discretion to choose to believe one medical expert over another, even if that physician does not have an accurate history of the medical condition." Thus, Indigo acquiesced in the ALJ's finding that Indigo is liable for not less than one-half of Wright's TTD. Moreover, it is abundantly clear from a review of the record that Dr. Changaris' report was reviewed by Dr. Wood in making his report, and that both the ALJ and the Board were aware of

it. Dr. Changaris' findings do not appear to be remarkably different from the findings of Dr. Ballard, who treated Wright after his injury at Barton House. The ALJ carefully reviewed all the medical proof in the record. Counsel correctly observed that the ALJ has discretion to choose to believe one medical expert over another. Staples, Inc. v. Konvelski, 56 S.W.3d 412, 416 (Ky. 2001), Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). The question properly before us for decision is whether or not the Board erred as a matter of law in reversing the ALJ's apportionment of TTD benefits. In its May 7, 2004 opinion the Board had this to say on the issue at pages 17-19:

The rationale underpinning an apportionment of liability for medicals, however, does not carry over to an apportionment of TTD benefits. On this issue, we agree with Barton House that the ALJ erred in holding it liable for one-half of those TTD benefits payable from the date of Wright's second injury through the date he reached maximum medical improvement following surgery. The ALJ awarded TTD benefits to be paid in equal shares by Barton House and Indigo beginning May 25, 2001, based on Wright's AWW at the time of his second injury on May 24, 2001. Wright underwent surgery on October 10, 2001, and was found to have reached MMI by his treating surgeon as of March 27, 2002, when TTD benefits were terminated. The ALJ made no specific findings of fact with respect to the basis for apportioning liability between the two employers from May 25, 2001, through October 10, 2001. Although she expressly relied on the opinions of Dr. Guarnaschelli in apportioning liability for permanent income benefits and for Wright's medical

treatment, the ALJ offered no real explanation for why Barton House should share responsibility for TTD benefits payable between the date of the second injury and the date of surgery. Her only "finding" reads, "It appears that there were no outstanding TTD benefits due from the Barton House injury itself, and the record reflects that the two Defendants previously shared equally in the payment of TTD benefits in the amount of \$469.23 [per week]."

TTD benefits are payable for so long as an employee "has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment." KRS⁴ 342.0011(11)(a). The primary purpose of TTD benefits, like all income benefits, is to compensate disabled workers for the decrease in wage-earning capacity that has resulted from an injury caused by work. Newberg v. Weaver, 866 S.W.2d 435 (Ky. 1993). Thus, unlike medical benefits, TTD benefits are tied directly to the injured worker's lost wages. Temporary total disability benefits are payable at a rate determined by reference to the worker's AWW on the date of injury for which benefits are payable. KRS 342.730(1)(a). Here, it is undisputed that Wright was released to return to work with restrictions after his injury at Barton House, and was employed first as an over-the-road truck driver and then as a sous-chef (sic) and executive chef at Indigo before the second work-related event on May 24, 2001. He was earning a substantially higher wage at the time of his second injury than at the time of his first injury. Bearing in mind the goal of compensating the injured worker for the whole of this disability at all points in time, we agree with the ALJ that Wright's TTD rate following the second injury should be commensurate with his AWW earned in the

⁴ Kentucky Revised Statutes.

employ of Indigo. As a matter of law, however, we agree with Barton House that it cannot properly be saddled with liability for those income benefits payable at a higher rate and as a result of the superimposition of Wright's injury at Indigo on his pre-existing condition attributable to the first injury at Barton House.

While it is true that Barton House and Indigo agreed to pay TTD and medical expenses while Wright underwent treatment by Dr. Guarnaschelli, the parties expressly reserved their rights to contest liability for those benefits and have the issue ultimately decided by the ALJ. The ALJ found that the incident at Indigo produced an "injury" as defined under the Act and that it was this second injury that "became truly disabling." These findings support an award of TTD benefits against Indigo for that period following the 2001 work injury during which Wright was unable to work and was undergoing treatment. See W.L. Harper Construction Co. v. Baker, 858 S.W.2d 202 (Ky.App. 1993). However, we find no authority that would permit Barton House to be held responsible for any portion of an additional disability resulting after the August 23, 2000⁵(sic) disabling injury at Indigo-an injury for which it has no liability and which would be (sic) cause it to be held accountable for payment of TTD at a higher rate than could have been imposed on July 21, 2003. On the issue of apportionment, therefore, we reverse.

Bearing in mind the scope of our review, we cannot say that the Board has overlooked or misconstrued controlling law in this instance. The ruling of the Board is consistent with our decisions and Workers' Compensation law generally. See Sears Roebuck & Company v. Dennis, at 355; see also 3 Arthur Larson

⁵ The correct date is May 24, 2001, as noted earlier by the Board. August 23, 2000 was the date of Wright's injury at Barton House.

and Lex K. Larson, Larson's Workers' Compensation §153.02[3]
(Desk Edition 2002).

Finally we turn to Barton House's appeal, and Indigo's second issue on cross-appeal, which we consider together. Barton House seeks an order directing that it be reimbursed for the TTD benefits it has already paid pursuant to the ALJ's apportionment order⁶. Indigo seeks an order setting out in detail the duties of each party and their respective insurers in regard to the apportionment of Wright's medical expenses. The Board did not address the issue raised by Barton House, as we noted above, due to 803 KAR 25:010, §21(15)(b). The Board did consider Indigo's request for an order, and declined to grant it, citing Custard Insurance Adjusters, Inc., v. Aldridge, 57 S.W.3d 284 (Ky. 2001). That case holds that where the dispute has "no effect ... on the relationship or the obligations that exist between either the employer or its carrier and the injured worker", the matter under consideration "does not arise under Chapter 342 and should be raised in circuit court rather than in the workers' compensation proceeding". Id. at 288, citing Wolfe v. Fidelity & Casualty Insurance Company of New York, 979 S.W.2d 118 (Ky.App. 1998); see also KRS 342.305. An appeal to this court is neither a mechanism to circumvent the Board's rule

⁶ As we noted previously, Indigo agreed in its brief that if it was not successful in its appeal of the issue, it would reimburse Barton House under the terms of their agreement before the ALJ.

prohibiting reconsideration nor a substitute for an enforcement action in circuit court.

The decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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