

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-001895-WC

DAWAHARES, LLC

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-01958

NORA NICHOLS;
HON. LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE AND TAYLOR, JUDGES; EMBERTON,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Dawahares, LLC petitions this Court to review a July 28, 2006, opinion of the Workers' Compensation Board (Board) affirming the Administrative Law Judge's (ALJ) decision to enhance Nora Nichols' income benefits by the three multiplier and to award vocational rehabilitation benefits. We affirm.

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Nichols was an employee of Dawahares and sustained a back injury while lifting a table at Dawahares' store in Louisville, Kentucky. Nichols filed a claim for workers' compensation benefits. In an opinion and award entered February 28, 2005, the ALJ found that Nichols sustained a work-related back injury and assigned an 11% whole body impairment rating. Nichols pursued an appeal to the Board. The Board remanded to the ALJ for reconsideration of whether application of the three multiplier in Kentucky Revised Statutes (KRS) 342.730(1)(c)(1) or the two multiplier in KRS 342.730(1)(c)(2) was proper. Upon remand, the ALJ revealed that he inadvertently overlooked evidence that Nichols was incapable of returning to work without restrictions. The ALJ then found that Nichols' income benefits should be enhanced by the three multiplier under KRS 342.730(1)(c)(1). The ALJ also concluded that Nichols was entitled to vocational rehabilitation benefits. Being unsatisfied with the ALJ's opinion, Dawahares sought review with the Board. By opinion entered July 28, 2006, the Board affirmed the ALJ's decision. This review follows.

Dawahares contends the ALJ committed error by determining that the three multiplier of KRS 342.730(1)(c)(1) was applicable. Specifically, Dawahares alleges that Nichols was only entitled to the two multiplier found in KRS 342.730(1)(c)(2). Although Nichols does not have the physical capacity to return to her pre-injury work position, Dawahares alleges that Nichols was nevertheless capable of earning a post-injury wage greater than her pre-injury wage. Dawahares points out that Nichols could presently earn a wage greater than or equal to her pre-injury wage if not for the fact that she was

currently attending college full time. As such, Dawahares argues that Nichols was only entitled to the two multiplier of KRS 342.730(1)(c)(2).

It is well-established that the findings of fact of the ALJ are afforded great latitude and will not be disturbed if supported by substantial evidence. Uninsured Employers' Fund v. Garland, 805 S.W.2d 116 (Ky. 1991). In other words, if there exists evidence of substance to support the ALJ's findings, his conclusion will not be clearly erroneous. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Moreover, the ALJ has the sole province to assess the weight and credibility of evidence. Ingersoll-Rand v. Edwards, 28 S.W.3d 867 (Ky.App. 2000). Of course, issues of law are reviewed *de novo*.

In addressing Dawahares' argument, the Board concluded:

[T]he evidence reveals Nichols' annual salary at the time of her injury was \$32,000 per year. Even though she returned to that job in a light duty capacity, she was unable to continue that employment when she was required to work full duty. Likewise, her job at Friedman Jewelers, which produced a post-injury average weekly wage commensurate with her pre-average weekly wage, was outside her restrictions and she was forced to quit that job. Nichols' subsequent employment at Penney's and as a manager in training at Helzberg Diamonds has produced a level of wages significantly below her pre-injury wage level. The result Dawahare's [sic] seeks would require this Board to speculate that Nichols, given her current medical restrictions, will at sometime in the future be able to command \$32,000 per year indefinitely. The ALJ's finding that (c)1 is more appropriate is not so wholly unreasonable that it must be reversed as a matter of law. . . .

Considering the evidence as whole, we must agree with the Board that the ALJ's decision to apply the three multiplier of KRS 342.730(1)(c)(1) is not clearly erroneous. Indeed, there existed evidence, including her work history, that indicated Nichols did not possess

the capacity to work so as to earn a wage that equaled or exceeded the wage earned before the injury. See Adams v. NCH Healthcare, 199 S.W.3d 163 (Ky. 2006). As such, we cannot say the ALJ committed reversible error by finding that the three multiplier of KRS 342.730(1)(c)(1) was applicable.

Next, Dawahares argues that the ALJ erred by concluding that Nichols was entitled to vocational rehabilitation benefits under KRS 342.710. Specifically, Dawahares argues that Nichols:

[C]ontinued performing the same retail sales work that she had performed over her entire work history even after her work injury, thereby showing that she was capable of performing the work for which she had previous training and experience.

Dawahares' Brief at 14.

KRS 342.710(3) provides in relevant part:

When as a result of the injury he is unable to perform work for which he has previous training or experience, he shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him to suitable employment.

The Board pointed out that suitable employment “means attempting to achieve a reasonable relationship between the worker’s pre- and post-injury earning capacity.” The Board further noted:

Nichols’ pre-injury employment produced a salary of \$32,000 a year and the evidence reveals she was incapable of continuing that employment. Her subsequent employment with Friedman Jewelers, which produced similar earnings, also failed because of her physical incapacity to do the job. Likewise her attempt to work for Penney’s, though producing significantly less pay, also failed because of her physical

limitations. Though at the time of the opinion and award she was working full-time as a manager in training for Helzberg Diamonds, her rate of pay was not even remotely as remunerative as her job at Dawahare's [sic]. Under these circumstances, we are unable to conclude the ALJ's decision is unreasonable.

As herein before noted, the evidence also indicated that Nichols lacked the physical capacity to perform the work she had performed prior to her injury. Considering the evidence as a whole, we believe there existed substantial evidence of a probative value to support the ALJ's decision to award vocational rehabilitation benefits to Nichols.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark P. Niemi
FERRERI & FOGLE
Lexington, Kentucky

BRIEF FOR APPELLEE, NORA
NICHOLS:

Diana Beard Cowden
DIANA BEARD COWDEN, P.S.C.
Lexington, Kentucky