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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001129-WC

NESCO — APPELLANT

v. — PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-07-71953

JACKLYN HADDIX; HON. JOSEPH W. JUSTICE, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

AND

NO. 2009-CA-001564-WC

JACKLYN HADDIX — CROSS-APPELLANT

v. — CROSS-PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-07-71953

NESCO; HON. JOSEPH W.
JUSTICE, ADMINISTRATIVE LAW
JUDGE; AND WORKERS'
COMPENSATION BOARD CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND THOMPSON, JUDGES; GRAVES,[1] SENIOR JUDGE.

GRAVES, SENIOR JUDGE: : Nesco petitions for review of an opinion of the Workers' Compensation Board (Board) which reversed and remanded an opinion, award and order of the Administrative Law Judge (ALJ). The two leading issues on appeal are (1) whether the ALJ properly calculated the average weekly wage of former Nesco employee Jacklyn Haddix under KRS 342.140; and (2) whether the Board exceeded its authority in remanding the issue for additional proof and findings of fact. We affirm.

Nesco is an employment agency which places its workers in various jobs in exchange for a percentage of their wages. The placements are usually temporary and vary in duration. Occasionally, a job may be "temp to hire," which means that the individual Nesco sends to fill a position may be hired permanently.

Jacklyn Haddix, who was 48 years of age at the time of the final hearing, began working at Nesco in 2005. She has a high school diploma and has

[1] Senior Judge J. William Graves 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.

held jobs as a day care worker, food service worker, and assembly worker. Nesco placed Haddix with different employers; the periods of employment varied in duration, with substantial intervening periods when Haddix was not employed. The flexibility of these assignments was convenient for Haddix, who has custody of her young granddaughter.

Nesco placed Haddix with Toyo Lex for two days in October 2005, and with Yokkaich from November 2005 until April 2006. After her placement with Yokkaich ended, Haddix worked at various other short assignments until April 2007, when she was placed by Nesco with Star Manufacturing. At Star, she performed assembly work that involved filling tubs with small parts and then carrying the fifty-pound tubs to a skid. She also performed tasks that required her to stand, weld and work over the height of her shoulder. Her assignment with Star ended after about four weeks, in June 2007. On August 6, 2007, she was sent back to Star to perform the same job at $8 per hour for forty hours per week. The duration of the employment was not specified. According to Haddix, a staffing specialist at Nesco told her that the job was a "temp to hire" position, but the staffing specialist denied making this statement. Haddix was the only worker that Nesco sent back to Star in August 2007. Two days later, on August 8, 2007, Haddix slipped on some oil while at work and fell backwards, injuring her neck. She was placed on light duty work at Nesco until October 16, 2007, when she was terminated.

The ALJ found that Haddix had suffered a work-related injury; that her functional impairment was 17 percent; and that she was unable to return to the same type of employment and hence her award was eligible for the triple multiplier under KRS 342.730(1)(c). In calculating Haddix's average weekly wage (AWW), the ALJ made no direct reference to the pertinent statute, KRS 342.140, choosing instead to rely on Nesco's calculation of her AWW. The ALJ noted that Haddix's work record was "very sporadic" and consequently, treating her employment at Star at the time of her injury as a permanent job for purposes of calculating AWW was "unrealistic." After acknowledging that using the amount calculated by Nesco would mean that Haddix would receive very little in compensation benefits for a very serious injury, the ALJ adopted Nesco's AWW of $45.18.

The pertinent portions of KRS 342.140 state as follows:

> The average weekly wage of the injured employee at the time of the injury or last injurious exposure shall be determined as follows:
>
> (1) If at the time of the injury which resulted in death or disability or the last date of injurious exposure preceding death or disability from an occupational disease:
>
> …
>
> (d) The wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen (13) consecutive calendar weeks

> in the fifty-two (52) weeks immediately preceding the injury.
>
> (e) The employee had been in the employ of the employer less than thirteen (13) calendar weeks immediately preceding the injury, his average weekly wage shall be computed under paragraph (d), taking the wages (not including overtime or premium pay) for that purpose to be the amount he would have earned had he been so employed by the employer the full thirteen (13) calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation.

Nesco applied section (1)(d) to arrive at $45.18, by averaging Haddix's wages over the thirteen weeks immediately preceding the date of the injury. (She received three paychecks during this period, in the amounts of $248.00 on May 18, 2007, $147.40 on June 15, 2007, and $192.00 on August 10, 2007.) It is unclear why Nesco selected these thirteen weeks, since under section (d) the thirteen weeks most favorable to the employee in the preceding fifty-two weeks should be used. In Haddix's case, these most lucrative weeks spanned from February 2007 to May 2007, when, according to Nesco's own calculations, her average weekly wage was $59.08. Nesco also contended that, even under section (1)(e), an AWW of $45.18 was correct, as reflecting a "realistic snapshot" of Haddix's overall employment in the thirteen weeks preceding the injury.

The Board reversed the ALJ's decision on this issue, holding that (1)(e) was the section of the statute that should have been applied to calculate Haddix's AWW. Because the ALJ had not specified what statutory or case law

authority he had relied in determining the AWW, the Board remanded the case for reconsideration of this issue and for taking additional evidence relevant to section (1)(e). It directed the ALJ as follows:

> [T]he ALJ need not believe that Haddix was a permanent employee of Star in order to use her full-time or close to full-time pay when calculating her AWW. Rather, the ALJ must consider the unique facts and circumstances in this case and based on that information determine what Haddix would have earned had she been so employed by the employer for the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation.
>
> Accordingly, this matter must be remanded to the ALJ for the taking of additional evidence as set forth in this opinion. As pointed out by Rogers, no one else but Haddix was sent to Star when the most recent opening was available at Star. Haddix's work pattern was erratic and sporadic but the fact remains that Haddix was the one chosen by Nesco to work for Star and had already worked for Star on two other occasions during 2007. On the first occasion, her employment lasted for almost four (4) weeks. Her employment was terminated either because there was a layoff or the purpose of Haddix's work at Star had ended. The necessary records of Star and Nesco are available to establish what work was available to other employees in a similar occupation for the thirteen calendar weeks immediately preceding the injury.

The Board's opinion included a dissent, which agreed that KRS 342.140(1)(e) was the appropriate section for calculating Haddix's AWW, but contended that Haddix had failed to meet her burden of proving what "she would have earned for the full thirteen weeks immediately preceding the injury and had worked, "<u>when work was available to other employees in a similar occupation</u>."

The dissent also observed that there was no compelling evidence that Haddix would have worked any more regularly than her sporadic work record established and that the ALJ 's decision was reasonable under the evidence presented.

In reviewing a decision of the Workers' Compensation Board, our function "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." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

On appeal, Nesco contends that the determination as to whether the AWW should be calculated under KRS 342.140(1)(d) or (e) was a question of fact for the ALJ, and that consequently the Board's decision that section (e) must apply was a factual finding beyond the scope of the Board's review. "An appellate court reviews the application of the law to the facts and the appropriate legal standard *de novo*." *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001). It was certainly not beyond the scope of the Board's review to direct the ALJ to apply the correct statutory standard to the facts, particularly as the ALJ never specified which section of the statute he was applying. In a factually-similar case, *C & D Bulldozing Co. v. Brock,* 820 S.W.2d 482 (Ky. 1991), the Board also reversed the ALJ on wage calculation and held that section (1)(e) rather than (1)(d) provided the proper method of calculation. In *Brock*, the ALJ did specify which section of the statute he was applying, but provided no factual findings to support his decision. The employer argued that the Board had exceeded the proper scope of review and

invaded the province of the fact finder by substituting its judgment for that of the ALJ. The Kentucky Supreme Court disagreed, noting that the Board "of necessity, considered the testimony, which in fact did not support the ALJ's conclusion, and from which it drew the only possible inference." *Brock*, 820 S.W.2d at 485. In the case before us, the ALJ did make findings of fact regarding the nature of Haddix's employment, but failed to specify which statutory standard was being applied to these facts. Under *Brock*, it was well within the Board's authority to direct the ALJ to apply (1)(e). An ALJ is required to make sufficient findings of fact to support his opinion and to permit meaningful review. *Shields v. Pittsburgh & Midway Coal Mining Co.*, 634 S.W.2d 440, 444 (Ky. App. 1982).

Nesco next argues that the evidence establishes that Haddix worked for Nesco more than thirteen weeks prior to the date of injury and that therefore section (1)(d) should apply. As we have already noted, it is unclear why in applying section (1)(d) Nesco used the thirteen weeks immediately preceding the date of Haddix's injury to calculate AWW, since section (1)(d) requires the most favorable of the thirteen-week segments in the prior year to be employed. Again, the factual situation is similar to that *Brock*, in which the claimant worked for the employer for at least nine weeks over a fifteen-week period preceding the injury. The employer maintained that if there are thirteen weeks between the date of hire and the date of injury, then (1)(d) must apply. The Supreme Court disagreed, explaining as follows:

> C & D has misstated the statutory scheme which does not turn upon the time period from an original date of hire to the date of injury, but turns upon the actual period of employment. The statutory language is clear that one should consider how long the employee "had been in the employ of the employer." While this process would be very simple in the case of continuous employment, where the work is sporadic, a determination must be made on a case-by-case basis.

Brock, 820 S.W.2d at 485. The Supreme Court further noted that there was no indication that the employment relationship continued during the periods when the claimant was not working:

> [T]here was no indication that during the 15-week period the claimant had any rights which he could assert against the employer, or had any connection, however tenuous, with the employer; that there was no indication that C & D had provided any benefits to its employees which continued for claimant when he received no wages, nor was there any indication that claimant had any priority with respect to reemployment; and that there was no indication that C & D continued any health and accident insurance benefits for claimant during the time he was off from work or that they were obligated to do so.

Id.

Haddix was first hired by Nesco in 2005, and her employment with Star began in April 2007, ended after four weeks, and then recommenced for two days prior to her injury on August 8, 2007. In the periods between the temporary jobs arranged for her by Nesco, she was plainly in the same position as the employee in *Brock*. Indeed, it was the uncontradicted testimony of Julie Gammon, an area manager for Nesco, that during the period when employees are not working for an outside employer, they are not employees of Nesco. For purposes of

calculating AWW, Haddix was not an "employee" of Nesco for full the thirteen weeks preceding August 8, 2007. Under *Brock*, the Board correctly held that (1)(d) was the applicable section.

Nesco further argues that the ALJ's adoption of $45.18 as Haddix's AWW was equally correct under section (1)(e) or (1)(d), because it was a realistic snapshot of her sporadic employment pattern. In *Huff v. Smith Trucking*, 6 S.W.3d 819 (Ky. 1999), the employee worked for two of the thirteen weeks immediately preceding his injury, earning a total of $375.00. The employer argued, and the Court of Appeals agreed, that these total earnings must be divided by 13 weeks to yield an average weekly wage of $28.85.

The Kentucky Supreme Court specifically rejected this approach, mandating instead a computation pursuant to (1)(e) which "must take into consideration the unique facts and circumstances of each case." *Id*. at 822.

> KRS 342.140(1)(e) applies to injuries sustained after fewer than 13 weeks' employment. It utilizes the averaging method set forth in KRS 342.140(1)(d) and attempts to estimate what the worker's average weekly wage would have been over a typical 13-week period in the employment by referring to the actual wages of workers performing similar work when work was available. As was recognized in *Brock*, the goal of KRS 342.140(d) and (e) is to obtain a realistic estimation of what the injured worker would be expected to earn in a normal period of employment.

Id. at 821.

Although there is no dispute that Haddix's employment with Nesco had been sporadic, there is no indication that the ALJ considered the factors set

forth in section (1)(e) or the guidance provided in cases such as *Brock* or *Huff* when he ruled that her AWW should be based on the average amount she earned in the thirteen weeks immediately preceding the injury. The Board did not err in directing the ALJ to reconsider the evidence in light of the appropriate statutory and case law.

In her cross-petition, Haddix argues that such a reconsideration is unnecessary and that the ALJ should calculate her AWW as if she had worked full-time for the thirteen weeks prior to the injury. She points to the evidence that she had been hired by Nesco to work at Star indefinitely, with no ending date; that she had worked at a previous Nesco placement for six consecutive months; and that Nesco has another employee who has been working at a "temporary" placement for nearly five years. She argued that Nesco had failed to offer any evidence from Star that Haddix's placement would not have lasted for at least thirteen weeks. Our case law is clear, however, that the intermittent nature of her employment must also be considered by the ALJ in arriving at a reasonable estimation of her AWW. As the *Brock* court observed:

> It is unfortunate that there is not a provision which is more narrowly tailored to accommodate consistently intermittent employment that is still not seasonal employment. However, the compensation scheme is based upon a determination of average weekly wages, and we must apply the statute as best we can to varying circumstances.

Brock, 820 S.W.2d at 486.

Nesco next argues that the Board erred in remanding the case for further findings under (1)(e). Nesco asserts that the records of Star and Nesco relating to what work was available to other employees are unavailable and should in any event have been requested by Haddix as forming part of her burden of proof. *See Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003). Nesco relies on *T.J. Maxx v. Blagg*, 274 S.W.3d 436 (Ky. 2008), which held that an ALJ's *sua sponte* order of a university evaluation after the proof had been closed and the briefs submitted was an abuse of discretion because it violated the pertinent regulations governing discovery and proof and because the disparity in the evidence which prompted the order did not warrant reopening. In this case, however, no regulations bar the Board's action in reopening the proof. Morevoer, in *Huff,* a remand by the Board for further findings on precisely this issue of AWW was acceptable. *Id*. at 820. In a situation such as this, where the parties and the ALJ appeared to be uncertain as to the applicable statutory section for calculating AWW, such a remand for further findings is not a misuse of the Board's power. If the records relating to other employees are unavailable, the ALJ may still reconsider the existing proof in light of KRS 342.140(1)(e) and the relevant case law.

Finally, Nesco argues that the Board was improperly attempting to influence the ALJ's ruling in the following portion of its opinion:

> In this case, the ALJ had before him Haddix's testimony that she had successfully worked earlier at Star for Nesco. She then returned to Star for two days which

> was described by Haddix as a "temp-to-hire" assignment but by Kelly Rogers as a "short term assignment," or "indefinite" duration. Having been returned to Star by Rogers because she was one of its "good employees" and because Haddix had been assigned there before, we think more than likely given that past relationship, Haddix would have worked more than 3 weeks during the 13 week period following her August 6, 2007 assignment with Star.
>
> Of course, this Board is without authority to substitute its judgment for that of the ALJ unless the evidence is so overwhelming, upon consideration of the whole record, as to compel a contrary finding. [Citations omitted.] We do not believe the evidence necessarily compels a contrary finding in this matter.

Nesco contends that this portion of the opinion should be stricken. The Board's observation regarding the likelihood that Haddix's employment would have continued for more than three weeks is not a binding directive on the ALJ. Furthermore, the Board correctly stated that it was without authority to substitute its judgment for that of the ALJ unless the evidence was so overwhelming as to compel a contrary finding, and that the Board did not believe that the evidence rose to that level. We see no need to strike these comments from the record.

The opinion of the Workers' Compensation Board reversing and remanding is therefore affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEE:

H. Brett Stonecipher
Lexington, Kentucky

BRIEF FOR APPELLEE/CROSS-APPELLANT:

Daniel E. Moriarty
Lexington, Kentucky