

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002129-WC

FRAZIER'S FARMERS SUPPLY COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-94513

VICKI JONES;
OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON AND NICKELL, JUDGES; SHAKE,¹ SENIOR JUDGE.

DIXON, JUDGE: Frazier's Farmers Supply (Frazier) seeks review of a decision of the Workers' Compensation Board, which reversed an ALJ's order on reconsideration and reinstated the ALJ's initial order favoring Vicki Jones,

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Frazier's former employee. Specifically, the Board concluded the ALJ exceeded his authority by re-evaluating the evidence as to the average weekly wage (AWW) used to calculate permanent total disability (PTD) benefits. We affirm.

Jones began working as a cashier at Frazier in September 2006.

While at work on February 16, 2007, Jones fell down a flight of stairs and injured her leg. Complications from her injury rendered her unable to work, and she filed a claim for workers' compensation benefits alleging permanent total disability.

Several contested issues were argued before the ALJ; however, for the purposes of our review, we need only address the issue of Jones's AWW. Jones's testimony indicated she earned \$7.00 per hour and worked forty hours per week; accordingly, she argued that benefits should be calculated pursuant to an AWW of \$280.00, producing a PTD award of \$186.67 per week. Frazier submitted an initial wage statement and two supplemental AWW-1 forms, which appeared to include overtime hours. Frazier argued its evidence established an AWW of \$220.26, based upon earnings of \$6.00 per hour.

The ALJ rendered an opinion and award on April 19, 2010, finding Jones permanently totally disabled. The ALJ awarded Jones PTD benefits of \$186.67 per week; however, the ALJ did not make an explicit finding regarding AWW.

Frazier filed a petition for reconsideration, contending that its wage records established an AWW of \$220.26, which equated to weekly PTD benefits of

\$146.84. Jones responded, arguing the ALJ's award was correctly based on her testimony regarding her AWW of \$280.00. The ALJ rendered an order on reconsideration sustaining Frazier's petition and amending the award to reflect a PTD rate of \$146.84 per week. Jones appealed to the Board, arguing the ALJ exceeded his authority on reconsideration by revisiting the merits of a contested issue, Jones's AWW. The Board agreed with Jones and reversed the ALJ's order and remanded the matter for reinstatement of the initial PTD award.

When this Court reviews a workers' compensation decision, our function is to correct the Board only where we believe "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).

Frazier urges this Court to conclude that the Board exceeded its authority by engaging in improper fact-finding when it reversed the ALJ's order on reconsideration. Frazier asserts that it filed "several sets of wage records" and, because Jones did not object, it was "presumed by all parties" that Jones's AWW was consistent with the records submitted by Frazier. We disagree.

A review of the record indicates that AWW was a contested issue. Frazier submitted various conflicting calculations of AWW, and Jones testified that she earned \$7.00 per hour for a forty hour work week. In his initial opinion, the ALJ awarded \$186.67 in PTD benefits, which correlated to the AWW of \$280.00 submitted by Jones. Although it is unfortunate that the ALJ did not explicitly state

the basis for his determination, the Board accurately pointed out that only two AWW calculations were argued by the parties, and the ALJ chose to rely on the AWW advocated by Jones.

Pursuant to KRS 342.281, when considering a petition for reconsideration, the ALJ “shall be limited in the review to the correction of errors patently appearing upon the face of the award . . . [.]” The Kentucky Supreme Court has explained that this language precludes the ALJ “from reconsidering the case on the merits and/or changing the findings of fact.” *Garrett Mining Co. v. Nye*, 122 S.W.3d 513, 520 (Ky. 2003).

Here, by sustaining the petition for reconsideration, the ALJ impermissibly changed his prior factual finding as to Jones’s AWW. The parties presented conflicting evidence regarding AWW, and the ALJ chose to rely on Jones’s testimony regarding her wages. Jones’s testimony constituted substantial evidence to support the award of PTD benefits. *Young v. Vanover*, 476 S.W.2d 836, 837 (Ky. 1972). The ALJ had “the authority to determine the quality, character and substance of the evidence[.]” *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985), and he was free “to believe part of the evidence and disbelieve other parts of the evidence . . . [.]” *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). We agree with the Board that the ALJ exceeded his authority by sustaining Frazier’s petition for reconsideration.

For the reasons stated herein, we affirm the decision of the Workers’ Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Tonya M. Clemons
Lexington, Kentucky

BRIEF FOR APPELLEE:

McKinnley Morgan
London, Kentucky