RENDERED: JANUARY 9, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001435-WC

WARREN CAMPBELL — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-13-01469

INTERNATIONAL COAL GROUP, INC.;
HONORABLE J. GREGORY ALLEN,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, LAMBERT, AND MAZE, JUDGES.

LAMBERT, JUDGE: Warren Campbell has petitioned this Court for review of the decision of the Workers' Compensation Board (the Board) affirming the decision of the Administrative Law Judge (ALJ) declining to apply the three times

multiplier pursuant to Kentucky Revised Statutes (KRS) 342.730(1)(c)1. Because we hold that the substantive evidence of record did not compel a different result, we affirm.

Born in 1951, Campbell is a high school graduate and has a work history that includes running heavy equipment for coal companies and the road department. He began working for International Coal Group, Inc. (ICG) on July 12, 2010, as a dozer operator, and he was laid off on December 2, 2011. After his lay off, Campbell noticed problems with his hearing, and he had his hearing tested at Beltone in August 2013. The audiogram revealed moderate to profound sensorineural loss of hearing with speech discrimination at 50% in the right and 50% in the left, and 60% binaurally. Hearing aids were recommended.

Campbell filed a Form 103 Application for Resolution of Hearing Loss Claim on September 26, 2013, alleging that he had sustained an occupational hearing loss during the course and scope of his employment with ICG. ICG received notice of his condition on August 8, 2013. A University evaluation was performed in December 2013 by Dr. Raleigh Jones and Dr. Trey Cline. Based upon the hearing test, Dr. Jones concluded that Campbell suffered from a work-related, bilateral noise induced sensorineural hearing loss due to his repetitive exposure to noise, and he assigned a whole person impairment of 11% pursuant to the Fifth Edition of the *AMA Guides*. Dr. Jones noted that Campbell had worn hearing protection intermittently over the past few years, and he recommended that

Campbell use bilateral hearing aids and use hearing protection when around noise as a restriction on his work activities.

In his deposition, Campbell testified that he had worked in the coal mining industry for seventeen years. He underwent a pre-employment physical examination for ICG, which included a hearing test. He had never been told that he had a hearing problem prior to his layoff from ICG in December 2011. His first hearing test after the layoff was at Beltone. He noticed problems with his hearing when he could not hear the dogs barking while hunting with a friend. Campbell stated that he had been exposed to loud noise at his prior employment as well. He never returned to work. On cross-examination, Campbell admitted that while he was working, he had never missed any work, received any treatment, or been involved in a work accident or injury due to a hearing problem.

The ALJ held a benefit review conference in early 2014, after which the contested issues remained whether Campbell was entitled to benefits pursuant to KRS 342.7305 with multipliers and whether he retained the physical capacity to return to the type of work he performed at the time of his injury. The final hearing was held on February 27, 2014. Campbell testified that after he was laid off, he collected unemployment benefits until he was approved for social security disability. He was drawing $2,050.00 per month. He stated that he had been exposed to noise over the course of his employment. He had noticed his hearing problems for a year or more, stating that he had been losing his ability to

distinguish what was being said in a room full of people. Regarding his need to hear at ICG, Campbell stated:

> You've got – they holler at you on the radio or whatever. You've got a two way and a CB both in all of the equipment, you know, and you've got – you've got to be able to hear that when they holler at you and want you to do something or other. You might be doing something you're not supposed to, I guess.

He went on to explain that he was in constant contact with other coal trucks and equipment during the course of his shifts. He needed to know where other maneuvers were taking place so that he would be able to communicate with the workers. Campbell believed that noise and his inability to hear and distinguish commands would make it unsafe for him to seek employment again. The matter was submitted at the conclusion of the hearing without briefing.

The ALJ rendered a decision on April 9, 2014. The ALJ noted that both Campbell and ICG relied on the evaluation by Dr. Jones. Dr. Jones had not recommended any restrictions other than the use of hearing protection when exposed to loud noise or that he not return to his former job duties. The ALJ concluded that Campbell retained an 11% impairment due to work-related hearing loss and that he had the ability to return to his former job duties within Dr. Jones' recommendations, stating:

> The ALJ can appreciate the plaintiff's testimony at the final hearing that he felt his loss of hearing would cause safety issues in a return to work in mining. However, the plaintiff's concerns do not appear to be borne out by medical findings or restrictions contained in the only medical evidence in the file.

Accordingly, the ALJ calculated Campbell's benefits pursuant to KRS 342.730(1)(b) without applying a multiplier. Campbell appealed the ALJ's decision to the Board, which affirmed the decision in an opinion entered August 1, 2014. The Board held that the record contained substantial evidence to support the ALJ's decision and that a contrary result was not compelled. This petition for review now follows.

Campbell argues that the ALJ misinterpreted the evidence and law, that his decision was not in conformity with the Act, that his decision was arbitrary or capricious or an abuse of discretion, and that the credible evidence was so overwhelmingly in Campbell's favor that no reasonable person could reach the same conclusion as the ALJ. On the other hand, ICG contends that the evidence of record does not compel a different result.

Our standard of review in workers' compensation appeals is well-settled in the Commonwealth. "The function of . . . review of the [Board] in the Court of Appeals 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). We shall proceed with this standard in mind.

Kentucky law is well-settled that "[t]he claimant in a workman's compensation case has the burden of proof and the risk of persuading the board in

his favor." *Snawder v. Stice*, 576 S.W.2d 276, 279 (Ky. App. 1979) (citations omitted). "When the decision of the fact-finder favors the person with the burden of proof, his only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to reasonably find as it did." *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). However, "[i]f the board finds against a claimant who had the burden of proof and the risk of persuasion, the court upon review is confined to determining whether or not the total evidence was so strong as to compel a finding in claimant's favor." *Snawder*, 576 S.W.2d at 280 (citations omitted). The *Francis* Court went on to explain:

> If the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made.
>
> Thus, we have simply defined the term "clearly erroneous" in cases where the finding is against the person with the burden of proof. We hold that a finding which can reasonably be made is, perforce, not clearly erroneous. A finding which is unreasonable under the evidence presented is "clearly erroneous" and, perforce, would "compel" a different finding.

Francis, 708 S.W.2d at 643 (Ky. 1986).

The present case involves the application of KRS 342.730(1)(c)1., which provides as follows:

> 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[.]

Campbell asserts that based upon the restrictions of the University evaluator and the danger it would impose for him to be at the jobsite using hearing protection, he lacks the physical capacity to return to the job he was performing for ICG and is therefore entitled to the three times multiplier pursuant to KRS 342.730(1)(c)1. These dangers would arise from his inability to hear commands, instructions, and audible alarms if he had to wear hearing protection as recommended by the University evaluator. He stated that it was "common knowledge" there is constant industrial noise in an open pit mining site and that the "restriction to wear hearing aids when working around loud noise is not practicable for a heavy equipment operator." Campbell specifically disagreed with the ALJ's statement that Dr. Jones stated he was capable of returning to his work as a heavy equipment operator. Rather, the restriction was to use hearing protection when he was exposed to loud noise, not that it would be safe for him to return to work due to his hearing loss. He also questioned whether he would be able to pass a pre-employment physical.

However, based upon our review of the record, we must agree with ICG that the evidence is not so overwhelming to compel a different result in this case. Dr.

Jones imposed the work restriction of using hearing protection if around loud noise, which supports the ALJ's finding and ICG's assertion that Campbell was able to return to work. There is no evidence, other than Campbell's own testimony, that his return to work would cause a danger to himself or others due to his need to use hearing protection, especially in light of the testimony that he had intermittently worn hearing protection in the past without experiencing or causing any injuries or accidents. Therefore, the ALJ's finding that Campbell retains the physical capacity to return to his former employment within the restrictions imposed is supported by substantial evidence of record, and the ALJ did not abuse his discretion in declining to apply the three times multiplier.

For the foregoing reasons, the Board's opinion affirming the ALJ's opinion, award, and order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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London, Kentucky

BRIEF FOR APPELLEE,
INTERNATIONAL COAL GROUP,
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Hazard, Kentucky