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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001937-WC

KOCH CORPORATION — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-10-01064

LYNWOOD GASPARD; HONORABLE
JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, J. LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, J., JUDGE: For a second time, Koch Corporation (Koch) has petitioned this Court for review of a portion of the opinion of the Workers' Compensation Board (the Board) affirming the decision of the Administrative Law

Judge (ALJ) related to injured worker Lynwood Gaspard's post-injury average weekly wage (AWW). Again, we reverse the Board's decision.

We shall rely upon the recitation of the underlying facts and procedural history of this case as set forth in this Court's previous opinion, *Koch Corp. v. Gaspard*, 2015 WL 1884043, at *1-4 (No. 2015-CA-000059-WC) (Ky. App. Apr. 24, 2015):

> Gaspard is currently fifty-one years old and lives in Ringgold, Louisiana. During the course and scope of his employment as a carpenter with Koch, Gaspard injured his lower back on October 6, 2008, while working in Houston, Texas, when he caught a large plate of glass. In his Form 101 Application for Resolution of Injury Claim filed September 17, 2010, Gaspard listed his AWW at the time of the injury as $1,300.00, and his current AWW was $870.00. . . . By interlocutory order entered June 20, 2012, the ALJ found the proposed surgery by Dr. Marco Ramos to be reasonable and necessary, and causally related to his 2008 work injury. The ALJ therefore ordered Koch to immediately pre-authorize payment for the recommended surgery. The ALJ also found that Gaspard was entitled to temporary total disability (TTD) benefits at a rate of $670.02 per week from June 9, 2010, and continuing until he reached maximum medical improvement (MMI) from his surgery. The matter was placed into abeyance until Gaspard reached MMI. Koch petitioned for reconsideration related to the TTD award, citing Gaspard's return to work with Flowers Baking Company and ABM Janitorial Services in 2009. The ALJ ordered that TTD benefits were to begin in December 2010. Gaspard underwent surgery on August 24, 2012.
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> On January 23, 2013, Koch moved to terminate TTD based upon income statements establishing that Gaspard was earning approximately $2,000.04 per week, which was greater than his pre-injury AWW. Because he had reached a level of improvement that allowed him to

work, Koch moved that TTD be terminated pursuant to the statute. Gaspard contended that the income from the bread company constituted "unearned" income because he did not have to physically work. Therefore, the income he brought in would not serve as income in determining TTD. The ALJ passed the motion for determination along with the merits of the claim. Koch continued to dispute this issue based upon Gaspard's tax records and moved to add fraud as an issue based upon Gaspard's representations that he was not working, which were contradicted by his tax information.

Following a benefit review conference (BRC) in July 2013, the ALJ granted Koch's motion to terminate TTD benefits and set a proof schedule. Koch also filed a special answer asserting that it was entitled to a credit for the overpayment of voluntary income benefits. Gaspard had received $91,122.63, excluding interest, in TTD benefits from December 15, 2010, through July 19, 2013. At a subsequent BRC in March 2014, the ALJ removed the claim from abeyance and set forth the stipulations as well as the contested issues that remained to be decided, including benefits per KRS 342.730 (multipliers), exclusion of pre-existing impairment, additional TTD, fraud, sanctions, date of MMI, and physical capacity.

On May 27, 2014, the ALJ entered an opinion, order, and award. Related to his earnings, the ALJ related Gaspard's testimony as follows:

> Gaspard answered a host of questions concerning his earnings with Flowers Bakery and the income tax filings. He does not prepare his own tax returns and uses a CPA. He does know he is bound by his signature on the tax return but admitted to paying little to no attention as to how the returns are prepared. It is his testimony he pays his employee (he referred to him as an independent contractor) in cash. He does not report to the IRS the payment on his income tax return and does not deduct what he pays the independent contractor. Earlier, Gaspard testified his income with Flowers Bakery was about $4,000

> per year. At the hearing he agreed his income tax return reflected a much higher amount, over $90,000 in one of the years, but the return did not reflect his expenses including what he paid the independent contractor. After expense, his earning was between 20,000 and 25,000 per year.

Later in the opinion, the ALJ stated:

> The record contains numerous filings by Defendant Employer related to Gaspard's work with the bread route and the earnings. These have all been reviewed but are not summarized. The territorial exhibits and routes he drove have been reviewed as have the tax returns reflecting significant income during the time Gaspard was receiving TTD. As discussed below, how much Gaspard earned with the bread route and how much he worked in the route do not affect the findings herein.

In the findings of fact and conclusions of law section regarding Koch's fraud allegation, the ALJ observed:

> It is also noted there are, no doubt, problems with Gaspard's tax filings; he shows earnings from the bread route on the W–2 even though he says he was self-employed; he does not reflect payments made to his independent contractor; and, he has listed himself as an employee of Flowers Bakery instead of the route owner, to name a few. Clearly, his tax filings contain numerous misleading statements. That, however, is not the concern of the Department of Workers' Claims. Allegations of tax fraud are questions for the IRS. None of the alleged misstatements have led to payment to which Gaspard was not otherwise entitled.

Related to Gaspard's TTD claim, the ALJ stated:

> In a nutshell, Koch argues the amount of income reflected on tax returns precludes TTD. Gaspard says the tax returns are wrong and do not

reflect expenses he paid. This is not relevant. No case law stands for the proposition if your earnings from another source are a certain amount, then no TTD.

Related to his permanent impairment, the ALJ assigned a 20% impairment and found that he qualified for the 3x multiplier, relying upon Dr. Huhn's 20% impairment assessment and Dr. Morris's opinion to find that "[f]ollowing a third back surgery, lifting restrictions are not unreasonable and seem only appropriate. Gaspard's work at the time of the injury involved heavy lifting, much bending and twisting and the opinion that he should avoid such activities is adopted herein." The ALJ ordered that Gaspard was to recover TTD at a rate of $670.02 per week from December 15, 2010, through July 23, 2013, and the sum of $285.88 per week for 425 weeks from October 6, 2008, in permanent partial disability (PPD) benefits. In addition, the ALJ awarded medical benefits. The ALJ did not find evidence of fraud to support an award of sanctions, and she did not find a basis to carve out any pre-existing active disability.

. . . .

Koch also filed a petition for reconsideration requesting additional findings of fact and the correction of patent errors. Koch argued that the ALJ did not provide sufficient findings to support her findings related to whether Gaspard was working and receiving wages; the amount of his wages he earned at ABM Janitorial Services and Flowers Bakery from 2009 through 2012 as reflected in his W–2s; and regarding each element of fraud. Koch also asserted that the ALJ used the wrong standard in awarding the 3x multiplier by failing to apply the *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003), analysis and that there should have been a carve out for Gaspard's prior active impairment. Gaspard objected to Koch's petition, asserting that it was a re-argument of the merits of the case.

The ALJ denied Koch's petition on July 1, 2014, addressing each of the issues raised in the petition. . . .

Regarding the standard for the 3x multiplier, the ALJ stated that

> Since Gaspard does not retain the physical capacity to return to the type of work he performed at the time of the injury, the 3x multiplier applies. Because he has not returned to work at a weekly wage equal or greater than the average weekly wage at the time of the injury, 342.730(1)(c)(2) does not apply and, therefore, the analysis used in *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003) is not applicable.

. . . .

Koch appealed the ALJ's rulings to the Board, raising the same issues. The Board entered an opinion affirming in part, vacating in part, and remanding on December 12, 2014. Regarding the first argument, that the ALJ failed to provide findings of fact regarding the amount of Gaspard's post-injury AWW, the Board agreed with Koch, stating that the ALJ erred in ruling that his post-injury earnings were not relevant. However, the Board found the "failure to determine the amount of income Gaspard earned from Flowers to be harmless error." The Board stated that because the relevant W–2s and tax returns established that Gaspard was a statutory employee pursuant to federal income tax laws, the amounts of income reflected in his W–2s were not determinative of the issue of whether he returned to work at an equal or higher wage than his pre-injury AWW. The Board then examined federal income tax statutes, based upon which it decided that "the applicable amount for determining whether Gaspard returned to work earning a wage equal to or greater than his pre-injury AWW is that amount shown on line twelve of his tax return which is calculated in the Schedule C attached." He was therefore permitted to deduct his business expenses from the amounts listed on the W–2s to calculate his net income from the bread route for purposes of determining whether KRS 342.730(1)(c)2. applied. Examining the tax returns, the Board stated that "in 2010, 2011, and 2012, Gaspard did not have yearly

> earnings in excess of his pre-injury AWW of $1,006.23." Gaspard's 2009 tax records were not included in the record. The Board concluded that the ALJ had correctly determined that Gaspard had not returned to work earning a wage that equaled or exceeded his pre-injury AWW and affirmed the award of benefits enhanced by the 3x multiplier without performing a *Fawbush v. Gwinn* analysis. The Board's ruling on this issue was also dispositive of the second issue: whether substantial evidence supported a finding that Gaspard returned to work at equal or greater wages.

In its first petition for review to this Court, Koch argued that the ALJ's award of benefits enhanced by the 3x multiplier was in error because the ALJ failed to make any findings of fact as to Gaspard's post-injury AWW and the Board overstepped its authority by making its own findings on this issue. We explained these allegations of error as follows:

> For its first argument, Koch contends that the Board circumvented appellate procedure by making its own findings regarding Gaspard's post-injury AWW. As Koch points out, the Board agreed with its argument that Gaspard's post-injury AWW was relevant. Rather than remanding the claim to the ALJ for findings, the Board went on to perform its own research, make its own findings related to AWW, and ultimately conclude that Gaspard's post-injury AWW was less than his pre-injury AWW. In doing so, the Board relied extensively upon Gaspard's tax returns, which the ALJ identified as having problems and containing "numerous misleading statements."

Id. at *7. We agreed with Koch that the Board exceeded its scope of review "when it deemed harmless the ALJ's failure to make any findings related to Gaspard's post-injury AWW and proceeded to make its own findings and apply federal tax laws." *Id*. We reversed the Board on this issue and directed the ALJ on remand,

> to make findings related to Gaspard's post-injury earnings, calculate his post-injury AWW pursuant to KRS 342.140 keeping in mind the Supreme Court's opinion in *Marsh v. Mercer Transp.*, 77 S.W.3d 592 (Ky. 2002), and determine whether a *Fawbush v. Gwinn* analysis is necessary related to the application of KRS 342.730(1)(c). The ALJ should not rely upon federal income tax statutes, but should rather rely upon Kentucky's relevant statutes as set forth in the Workers' Compensation Act.

Id. The Board remanded the claim to the ALJ "for an entry of a decision in conformity with the opinion" of this Court on June 17, 2015.

The ALJ entered an opinion, award and order on remand on July 6, 2015, again awarding Gaspard PPD benefits with the 3x multiplier.[1] In her summary of the evidence, the ALJ described Gaspard's deposition testimony related to this issue as follows:

> Gaspard answered a host of questions concerning his earnings with Flowers Baker and the income tax filings. He does not prepare his own tax returns and uses a CPA. He does know he is bound by his signature on the tax return but admitted to paying little to no attention as to how the returns are prepared. It is his testimony he pays his employee (he referred to him as an independent contractor) in cash. He does not report to the IRS the payment on his income tax return and does not deduct what he pays the independent contractor. Earlier, Gaspard testified his income with Flowers Bakery was about $4,000 per year. At the hearing he agreed his income tax return reflected a much higher amount, over $90,000 in one of the years, but the return did not reflect his expenses including what he paid the independent contractor. After expense, his earning was between 20,000 and 25,000 per year.

The ALJ went on to state:

[1] We shall only discuss the portions of the ALJ's opinion relevant to this appeal.

> The record contains numerous filings by Defendant Employer related to Gaspard's work with the bread route and the earnings. These have all been reviewed but are not summarized. The territorial exhibits and routes he drove have been reviewed as have the tax returns reflecting significant income during the time Gaspard was receiving TTD. As discussed below, how much Gaspard earned with the bread route and how much he worked in the route do not affect the findings herein.

Both of these summaries were included in the ALJ's original opinion, award and order. In her findings of fact and conclusions of law, the ALJ found and concluded that Gaspard had a 20% impairment due to his work injury and that he qualified for the 3x multiplier. Unlike in the first opinion, award and order, the ALJ found that Gaspard's "AWW at the time of the injury was $1,006.23 and his post injury earnings were: 2010 - $839.75; 2011 - &768.17; and, 2012 - $875.13." The ALJ went on to observe that:

> Significantly, in its brief, Koch concedes Gaspard's AWW was $1,006.23 yielding a yearly income of $52,323.96. The tax returns and the Schedule Cs reflect in 2010, 2011 and 2012, Gaspard did not have yearly earnings in excess of his pre-injury AWW of $1,006.23

Koch filed a petition for reconsideration, arguing that the ALJ failed to comply with this Court's directives on remand regarding the calculation of Gaspard's post-injury AWW. Koch argued that the ALJ improperly relied on tax documents in calculating Gaspard's AWW rather than following the Supreme Court's ruling in *Marsh v. Mercer Transportation*, *supra*, and the Workers' Compensation Act. Furthermore the ALJ failed to explain the method used to

calculate Gaspard's AWW for 2010, 2011, and 2012. Gaspard objected, and the ALJ denied Koch's petition.

Koch appealed to the Board, raising several issues in its brief, including the ALJ's failure to explain her findings in relation to Gaspard's post-injury AWW, to apply *Marsh v. Mercer Transportation*, or to conduct a *Fawbush* analysis. The Board rejected Koch's arguments on this issue, stating:

> Although the ALJ did not provide a step-by-step calculation of the post-injury earnings for 2010, 2011 and 2012, it is clear she divided by 52 the yearly business income amount indicated on Gaspard's Schedule C's for each year ($43,667.00, $39,945.00, and $45,507.00 respectively). The tax records entered into evidence regarding the income derived by Gaspard from the distributorship constitutes substantial evidence supporting the ALJ's findings of his post-injury AWW. The ALJ correctly outlined when a Fawbush analysis is necessary. Since the ALJ determined Gaspard did not return to work at an AWW equal to or greater than his pre-injury AWW, a Fawbush analysis was not required. Therefore, since the ALJ sufficiently followed the directions of the Court of Appeals, and her determinations regarding Gaspard's post-injury AWW and the application of the three multiplier pursuant to KRS 342.730(1)(c)1 are supported by substantial evidence, we affirm.

This petition for review now follows.

In its brief, Koch contends that the Board improperly affirmed the ALJ's finding of his post-injury AWW on remand and that the ALJ improperly adopted the Board's post-injury AWW calculations on remand and failed to make any findings pursuant to this Court's directives in the first opinion. Gaspard argues

that the ALJ's findings were consistent with this Court's directives and are supported by substantial evidence of record.

Our standard of review in workers' compensation appeals is well-settled in the Commonwealth. "The function of further 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).

In KRS 342.140, the General Assembly established the method to compute an employee's AWW. That statute provides in relevant part 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;
>
> . . .

> (f) The hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where the services are rendered by paid employees.

Koch has consistently cited to the Supreme Court of Kentucky's opinion in *Marsh v. Mercer Transp.*, 77 S.W.3d 592, 594 (Ky. 2002), to support its position that Gaspard's Schedule C deductions should be added back to his claimed income from the bread company to calculate his post-injury AWW. In *Marsh*, the Supreme Court explained that the ALJ calculated the AWW of the injured truck driver "by adding back to the net profit from operating the truck (as shown on the Schedule C and reported as income on the Form 1040), the depreciation allowance and the meal expense that had been deducted as expenses on the Schedule C and assigning half of the total to the claimant." *Id*. at 594. The Court went on to explain:

> The purpose of KRS 342.140 is to estimate the injured worker's earning capacity, an estimate that generally is based upon the worker's pre-injury earnings. Where wages are paid by the year, month, week, day, hour, or output, and the employment is longstanding, the calculation of average weekly wage is based upon the worker's actual pre-injury earnings, is purely mathematical, and requires little, if any, discretion on the part of the fact-finder. In contrast, where the duration of the employment is less than 13 weeks or where the worker's earnings are affected by the availability of work, the pre-injury earnings may not represent a realistic estimate of the worker's earning capacity. In such instances, KRS 342.140(1)(e) permits the ALJ to consider other factors. See, for example, *Huff v. Smith Trucking*, Ky., 6 S.W.3d 819 (1999), and C & D *Bulldozing v. Brock*, Ky., 820 S.W.2d 482 (1991).

> Likewise, when the worker's hourly wage cannot be ascertained, KRS 342.140(1)(f) directs the ALJ to consider the wage of paid employees who perform similar services instead of the injured worker's actual earnings.
>
> KRS 342.140(1)(f) looks to the usual earnings of "paid employees" who provide "similar services." Under those circumstances, questions concerning what expenses should be deducted from an employee-entrepreneur's gross receipts in order to determine the individual's earnings from the venture are immaterial. Nonetheless, the concept that a worker's average weekly wage is sometimes a function of the individual's productivity is clearly recognized in KRS 342.140(1)(d). For that reason, we are aware of nothing that would prevent the ALJ from concluding that the earnings of an over-the-road truck driver who is a paid employee are a function of the gross revenue that the driver's truck generates. Likewise, if supported by the evidence, an ALJ might also be free to determine that such workers are paid on another basis.

Id. at 595–96. The Court ultimately remanded the matter to the ALJ to consider and apply another subsection of KRS 342.140 for which the parties had introduced evidence.

In the present matter, we must agree with Koch that the ALJ failed to comply with our directives to calculate Gaspard's AWW under KRS 342.140 and to apply *Marsh v. Mercer Transp.*, *supra*. As Koch argues, the ALJ appears to have simply adopted the Board's method of calculating Gaspard's post-injury AWW without making any findings on this issue other than listing the AWW for each year. We note that the Board in its first opinion specifically relied upon federal statutory law to conclude that Gaspard was a statutory employee pursuant

to 26 U.S.C. § 3121(d)(3)(A) and Revenue Rule 90-93 and therefore was permitted to deduct his business expenses reflected in Schedule C of his tax returns. This method of calculating an injured worker's AWW is not included in KRS 342.140, and we specifically directed the ALJ to rely upon Kentucky's relevant statutes – and not rely on federal statutes – in making this calculation. However, because the ALJ failed to explain her method of calculating Gaspard's post-injury AWW, we must again reverse the Board's opinion on this issue and remand this matter to the ALJ for further findings.

On remand, the ALJ is directed to make sufficient findings related to Gaspard's post-injury AWW and to provide an explanation as to how that AWW is calculated. In making this calculation, the ALJ shall consider the provisions of KRS 342.140 and the Supreme Court's opinion in *Marsh v. Mercer Transp.*, *supra*, and shall not rely on the federal income tax laws relied upon by the Board.

For the foregoing reasons, the opinion of the Workers' Compensation Board is reversed, and this matter is remanded to the ALJ for further findings and consideration in accordance with this opinion.

ACREE, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

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