

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED."
PURSUANT TO THE RULES OF CIVIL PROCEDURE
PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C),
THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE
CITED OR USED AS BINDING PRECEDENT IN ANY OTHER
CASE IN ANY COURT OF THIS STATE; HOWEVER,
UNPUBLISHED KENTUCKY APPELLATE DECISIONS,
RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR
CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED
OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE
BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION
BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED
DECISION IN THE FILED DOCUMENT AND A COPY OF THE
ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE
DOCUMENT TO THE COURT AND ALL PARTIES TO THE
ACTION.

Supreme Court of Kentucky

2012-SC-000288-WC

DALLAS NATIONAL INSURANCE
COMPANY

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS
CASE NO. 2011-CA-001645-WC
WORKERS' COMPENSATION NO. 10-00698

JEFFREY BOARD;
BRUCE STULL, D/B/A J.B.T. TRUCKING;
VANCE TRUCKING COMPANY, INC.;
HONORABLE JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Dallas National Insurance Company, appeals from an opinion and order which granted Appellee, Jeffrey Board, permanent total disability benefits. Dallas presents four issues on appeal: 1) that the Administrative Law Judge ("ALJ") erred in determining that Kentucky has jurisdiction over Appellee's claim; 2) that the record does not establish that it provided Kentucky Workers' Compensation coverage to Appellee, or his employer, Bruce Stull d/b/a J.B.T. Trucking; 3) that the ALJ erred by awarding Appellee permanent total disability benefits; and 4) that the ALJ was clearly erroneous in granting

sanctions pursuant to KRS 342.310 because it had a reasonable foundation to deny Appellee temporary total disability benefits. For the reasons set forth below, we affirm the Court of Appeals.

Appellee, a Kentucky resident, began his employment as a tractor trailer truck driver for Stull's company in 2007. To begin a driving job, Appellee would drive from his home in Stanford, Kentucky, to Stull's house in Waynesburg, Kentucky, to pick up a truck and then proceed to the location where goods were to be picked up. Frequently, Appellee would be sent to pick up a shipment of tobacco in Glasgow, Kentucky, to transport to North Carolina.

The tobacco was shipped pursuant to an agreement between Stull and Vance Trucking Company, Inc., a North Carolina company. As part of this deal, Stull contracted with Vance to provide workers' compensation insurance for his employees. The agreement stated that in exchange for Vance providing workers' compensation insurance for Stull's employees, a deduction would be taken from the gross revenue Stull earned. Appellee was listed as a driver on Stull's application for workers' compensation and Vance's policy listed Appellee as an insured. Dallas was the workers' compensation policy insurer.

On January 13, 2010, Appellee was injured in an accident while hauling a load of tobacco at Vance's request. The accident occurred in North Carolina. Due to the accident, Appellee suffered injuries to his right hand, a fractured nose, multiple broken ribs, and multiple broken vertebra. Appellee has still not regained full use of his right hand (which is his dominant hand) and experiences severe pain when standing or sitting for long periods of time.

Appellee filed for workers' compensation benefits. The ALJ, after reviewing all of the evidence and medical records found Appellee was an employee of Stull and was entitled to permanent total disability benefits. He further found that Stull obtained workers' compensation insurance for Appellee through Vance, and that Dallas was responsible for coverage. Additionally, the ALJ sanctioned Dallas for failing to pay Appellee temporary total disability benefits after it became aware of the claim. Interestingly, Dallas failed to pay the TTD benefits even though it paid for Appellee's post-accident medical treatment. The Workers' Compensation Board and the Court of Appeals both affirmed the opinion and award. Dallas subsequently filed this appeal.

I. KENTUCKY HAS JURISDICTION OVER APPELLEE'S WORKERS' COMPENSATION CLAIM

As an initial matter, Dallas argues that North Carolina has exclusive jurisdiction over Appellee's claim. Dallas argues that since Appellee's accident occurred in North Carolina, that the majority of his work occurred in North Carolina, and that there is a choice of law provision in the contract between Vance and Stull which states it is to be governed by the laws of the State of North Carolina, that only North Carolina has jurisdiction over this matter. However, we agree with the conclusion of the ALJ, the Board, and the Court of Appeals that Kentucky has jurisdiction.

KRS 342.670 provides that Kentucky has extraterritorial workers' compensation jurisdiction over an accident occurring outside of the Commonwealth if: "(a) [h]is or her employment is principally localized in this state." A person's employment is principally located in Kentucky when: "1)

[h]is or her employer has a place of business in this or the other state and he or she regularly works at or from that place of business.” KRS 342.670(5)(d). The ALJ found that Stull’s business is located in Kentucky and that Appellee worked from that location. This conclusion is supported by evidence in the record, especially the fact that Appellee picked up the tractor trailer he drove from Stull’s business location in Kentucky. While North Carolina might have been an appropriate forum for bringing this claim since Appellee’s accident occurred there, the ALJ was correct in finding that Kentucky also has jurisdiction.

II. THERE IS SUFFICIENT EVIDENCE TO PROVE DALLAS PROVIDED WORKERS’ COMPENSATION COVERAGE TO STULL AND APPELLEE

Dallas next argues that the record in this matter does not support the conclusion that it provided workers’ compensation coverage to Stull or Appellee. Dallas contends that it did not have a contractual relationship with Stull, and therefore cannot be held liable for Appellee’s award. Further, Dallas argues that there was never a finding made regarding whether the policy they issued to Vance provides Kentucky Workers’ Compensation coverage which would cover Appellee, a Kentucky resident. However, the evidence presented in this matter clearly refutes Dallas’s arguments.

Vance and Stull entered into a contract entitled “Contractor Operating Agreement” whereby Stull’s trucking company would transport tobacco from Kentucky to North Carolina. This contract stated that Stull must provide workers’ compensation for each of its drivers, including Appellee, who haul goods for Vance. The Contractor Operating Agreement stated, “If [Stull] elects

not to procure worker's [sic] compensation insurance, it is understood and agreed that [Vance] may, but shall not be required to, deduct a reasonable amount each month for worker's [sic] compensation insurance according to the terms set forth in paragraph 12, below." Paragraph 12 provided that "Premiums due [Vance] may be deducted from any moneys otherwise due [Stull]."

Appendix A of the Contractor Operating Agreement further indicated that payments for transporting goods owed to Stull by Vance would be reduced for payment of workers' compensation insurance premiums. Additionally, a certificate of insurance was issued by Dallas covering the time period in which Appellee's accident occurred listing Appellee as the insured. Appellee was also listed on invoices for workers' compensation premiums paid to Dallas by Vance. There is no indication that Dallas's policy only would cover Appellee if he was a citizen of North Carolina. The ALJ's conclusion that Dallas insured Appellee through an agreement between Vance and Stull is supported by substantial evidence.

III. THE ALJ'S ASSIGNMENT OF A PERMANENT TOTAL DISABILITY RATING TO APPELLEE IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Dallas next attacks the ALJ's finding that Appellee is entitled to permanent total disability benefits. The ALJ made the following findings:

As to extent and duration, KRS 342.730(1)(a) allows an [ALJ] to make a finding of permanent total disability. *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000). In so concluding, the [ALJ] must use the factors set forth in *Osborne v. Johnson*, 432 S.W.2d 800 (Ky. 1968). Herein, the plaintiff is relatively young at age 47 and he does have a high school education but plaintiff's injuries have been extensive and involve

both his back and right hand. The minimum impairment rating assessed has been the 40% by Dr. Lester while Dr. Bilkey has assessed a 48% impairment rating. Permanent total disability is defined in KRS 342.0011(11)(c) as the condition of an employee who due to an injury has a permanent disability rating and has a complete and permanent inability to perform any type of work as the result of the injury. The [ALJ] believes that the restrictions imposed upon the plaintiff by Dr. Bilkey, which are permanent, preclude plaintiff from returning to his work as a truck driver and to any other employment. Dr. Bilkey limits the plaintiff to 15 pounds lifting at a maximum with no repetitive bending or prolonged standing and the avoidance of vibrations and jarring. Further, the [ALJ] believes plaintiff's own complaints of pain, which he places as a 7 on a 10 scale at best and up to a 10 at times. It is apparent to the undersigned that the plaintiff is totally occupationally disabled.

Hamilton, 34 S.W.3d at 51, stated that in determining whether to assign a permanent total disability rating the ALJ should consider factors consistent with those provided in *Osborne*, "such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities."

While the ALJ's opinion and award did not go into detailed analysis of the factors provided in *Hamilton*, we nevertheless believe those factors support his assignment of a permanent total disability rating to Appellee. The ALJ found Appellee's testimony credible and persuasive that as a result of the injuries sustained in the accident, he suffers from severe and lingering pain.

See Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977) (holding

that it is within the ALJ's discretion to choose what evidence to believe). Based on his belief that Appellee suffers from severe pain, it was reasonable for the ALJ to conclude that Appellee could not return to his prior job as a long-distance tractor trailer truck driver, and that he would have difficulty being able to work with any sort of regularity. *Hamilton*, 34 S.W.3d at 51.

Additionally, if the limitations caused by the lingering pain Appellee endures are added to the limitations Dr. Bilkey placed upon his ability to lift, it is reasonable for the ALJ to believe that Appellee would have trouble finding work consistently during normal economic conditions. *Id.*

While there is evidence which could support a finding that Appellee is not entitled to permanent total disability benefits, that alone is not an adequate basis for reversal on appeal. *Whittaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999). Because the ALJ's assignment of a permanent total disability rating to Appellee is supported by substantial evidence, we will not disturb it on appeal.

IV. THE IMPOSITION OF SANCTIONS AGAINST DALLAS FOR FAILURE TO PAY APPELLEE TTD BENEFITS IS SUPPORTED BY THE RECORD

Lastly, Dallas argues that the ALJ's imposition of sanctions against it for not paying Appellee temporary total disability benefits was erroneous. The ALJ ordered Dallas to pay 18% interest on Appellee's benefits from the date of his injury until the date he reached maximum medical improvement. Thereafter, Dallas is to pay 12% interest. Additionally, pursuant to KRS 342.310(1) the ALJ ordered Dallas to pay all of the litigation costs and attorney fees attributable to their failure to pay TTD benefits. Dallas contends that the sanctions are erroneous because it had a reasonable foundation to deny TTD

benefits because, among other things, it believed North Carolina had sole jurisdiction over the matter, and that Appellee was not Stull's employee.

The ordering of sanctions in this case was appropriate. Dallas began to pay Appellee's medical expenses two months after the accident occurred indicating that it believed it was liable for Appellee's benefits. But, even after it was joined as a party to the action, Dallas did not pay TTD and did not even enter an appearance until after the ALJ's initial opinion and award. Dallas also cannot plead ignorance as to the amount of TTD benefits Appellee is entitled to because Stull testified that he provided them with Appellee's wage records soon after the accident. The ALJ's assessment of sanctions against Dallas was neither grossly unfair nor unreasonable. *Peabody Coal Co. v. Goforth*, 857 S.W.2d 167, 170 (Ky. 1993).

For the reasons set forth above, we affirm the Court of Appeals.

All sitting. All concur.

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