RENDERED: February 2, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001459-WC

JAMES HANSEL — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-88570

FRUIT OF THE LOOM; SPECIAL FUND;
J. LANDON OVERFIELD, Administrative Law Judge;
and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, EMBERTON, and TACKETT, Judges.

COMBS, JUDGE: This is a petition for review of a decision of the Workers' Compensation Board (Board), which affirmed the administrative law judge's determination that the petitioner, James Hansel, is limited to an award of permanent partial disability benefits equal to twice the degree of his functional impairment rating because following his injury, he returned to his previous job at a wage equal to or greater than that which he earned before the injury. KRS 342.730(1)(b).

James Hansel suffered a work-related back injury in September 1995. He underwent lumbar surgery and returned to work

at Fruit of the Loom in February 1996. He worked briefly on light-duty and then returned to his pre-injury job in the factory's ink room. According to Hansel's last Application for Adjustment of Claim, his condition was aggravated on May 12, 1996, when he lifted two five-gallon paint buckets at work. He was examined by Dr. Allen Haddix, who recommended "bed rest two days when not at work" and light-duty for two weeks. Hansel returned to work pursuant to his light-duty restrictions; he then saw Dr. Bothwell Lee. According to Dr. Lee, Hansel's symptoms indicated lumbar strain. He provided a work-release statement that authorized Hansel's return to full-duty after two weeks.[1] A follow-up examination was not scheduled.

Although he had been released to light-duty and was being accommodated by Fruit of the Loom, Hansel erratically and frequently missed work during June.[2] Advised that he had violated the company attendance policy, Hansel was terminated on June 20, 1996. This claim followed.

The claim was originally decided by Administrative Law Judge J. Landon Overfield (ALJ Overfield) by opinion and award entered August 6, 1997. In evaluating the testimony, ALJ Overfield found that Hansel's termination was not related to his back problem and consequently that his "off-work status . . . does not alter his status as having returned to work in a manner

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[1]Dr. Lee's case history indicates that Hansel was re-injured at work "while lifting a screen filled with ink weighing about 22-30 lbs."

[2]His direct supervisor also described occasions where Hansel was found sleeping at his work station and was asked to get up and move about.

so as to subject him to the limitations of KRS 342.730(1)(b)."[3] He then awarded Hansel benefits equal to two times his functional impairment rate attributable to the injury he sustained while employed by Fruit of the Loom.

Thereafter, Hansel filed a Petition for Reconsideration, pointing out that ALJ Overfield had failed to award him temporary total disability benefits from June 20, 1996 through August 26, 1996, according to the parties' stipulation. Additionally, Hansel argued that the stipulation constituted a judicial admission that his employment had been terminated because of his work injury -- not because of excessive absenteeism -- and, consequently, that the provisions of KRS 342.730(1)(b) were not applicable to him. By order entered September 8, 1997, ALJ Overfield awarded Hansel the additional

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[3]The 1994 Amendment to KRS 342.730(1)(b), which applies here, reads in part:

> (1) Except as provided in KRS 342.732, income benefits for disability shall be paid to the employee as follows:
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> > (b) For permanent, partial disability, where an employee returns to work at a wage equal to or greater than the employee's preinjury wage, sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740, multiplied by his percentage of impairment caused by the injury. . . unless the employee establishes a greater percentage of disability as determined under KRS 342.0011(11), in which event the benefits shall not exceed two (2) times the functional impairment rate. . . .

period of temporary total disability benefits but refused to change his opinion as to the reason for Hansel's discharge and the applicability of KRS 342.730(1)(b).

Hansel appealed ALJ Overfield's ruling and award of benefits, both of which were affirmed by the Board. Subsequently, Hansel sought review in this court. By opinion rendered May 5, 1999, this court, J. Dyche dissenting, vacated the order of the Board and remanded the case with instructions to direct the ALJ to re-evaluate the reasons for Hansel's dismissal, weighing all appropriate evidence, including the stipulation regarding temporary total disability benefits. We specifically concluded, however, that Fruit of the Loom's decision to pay additional temporary total disability benefits to Hansel following his discharge was not a conclusive admission that the discharge was related to Hansel's injury.

Through his order on remand, ALJ Overfield again summarized the evidence relative to Hansel's discharge and specifically considered the temporary total disability stipulation as directed. Again, ALJ Overfield found that Hansel's employment had been terminated for reasons unrelated to his work injury. Because Hansel had returned to work at a wage equal to or greater than that which he had earned before his injury, ALJ Overfield concluded that his recovery is limited to twice his functional impairment rating by operation of law.

Hansel's subsequent Petition for Reconsideration was denied, and he once again appealed to the Board. The Board affirmed the decision of ALJ Overfield, concluding that he had

analyzed the totality of the evidence as directed by this court and that substantial evidence supported his determinations. This petition for review followed.

Hansel again argues that the ALJ erred by finding that his termination was unrelated to his work injury and by interpreting KRS 342.730(1)(b) in such a way as to limit his benefits to two times his impairment rating. Having reviewed the record and the Board's opinion, we are unable to conclude that the Board committed an error in construing the law or in assessing the evidence. Thus, we affirm.

Hansel disputes the ALJ's conclusion that his termination from employment was due to excess absenteeism rather than his work-related back problem. However, the record reflects that in his re-evaluation of the reasons for Hansel's dismissal, ALJ Overfield properly considered the meaning of Fruit of the Loom's decision to pay temporary total disability benefits following Hansel's termination -- the sole basis for our decision to remand the claim. ALJ Overfield specifically noted as follows:

> Plaintiff testified at his discovery deposition and at his hearing that after he returned to work after his surgical treatment he only missed work because of his low back problems. He was specifically questioned concerning records indicating that he had problems with his nerves and his pending divorce as well as his low back problems. He responded that the problems with his nerves and his domestic relations problems did not enter into his reasons for missing work. According to the deposition testimony of Jana Moore, Plaintiff's supervisor, and Tony Pelaski, the plant manager, Plaintiff's absenteeism had exceeded that allowed under company policy. Some of the absentee days

related to his back problems but others were reported as being due to sickness. Prior to Plaintiff seeing Dr. Lee on June 20, 1996, Jana Moore had discussed the absenteeism with him and had instructed him to meet with plant manager Pelaski. Mr. Pelaski testified that he terminated Plaintiff because Plaintiff had violated the attendance policy and company guidelines. Mr. Pelaski testified that he had asked Plaintiff to explain where he had been or what his problem related to and Plaintiff explained that it was personal and he had to attend a divorce hearing and that he was having personal problems. Mr. Pelaski testified that Plaintiff at no time mentioned his low back pain.

Plaintiff saw Dr. Lee on June 20, 1996. This was after he had been instructed by Jana Moore to see the plant manager. Dr. Lee's handwritten note indicated that Plaintiff appeared unkempt and unshaven and noting that his low back pain had gone down into his lower extremities. Plaintiff also reported to Dr. Lee that "last Thursday" he was called to the factory office and pressured to do more work. He went on to tell Dr. Lee that he also had gone to a divorce hearing with his wife and his troubles with his wife, at the factory and with his back had caused his nerves to be shot. Dr. Lee noted that Plaintiff says he has to get off work and noted that he had already had one heart attack. Dr. Lee then issued an off-work statement indicating that he should be off "for three weeks until he sees Dr. Lee on August 8, 1996." Of course, this would be a much longer time than three weeks.

As noted in the original opinion and award, the undersigned was not impressed with Plaintiff's testimony. This was an attempt to, in a delicate manner, indicate that after observing Plaintiff testify and considering all of the other evidence, the undersigned had problems with Plaintiff's credibility. This problem has not been rectified by the re-evaluation of the evidence or by the fact that Defendant Employer had stipulated to an additional period of entitlement to temporary total disability benefits.

Defendant Employer did, in May of 1997, stipulate that Plaintiff was entitled to TTD

> benefits for the period from June 20, 1996 through August 26, 1996. As noted by the Court of Appeals in its opinion, this stipulation is evidence to be considered but is not a conclusive admission that Plaintiff's termination was related to his low back injury. I have re-evaluated the evidence, including the fact that Defendant Employer stipulated Plaintiff's entitlement to temporary total disability benefits after his termination, and am still of the opinion that Plaintiff's termination in June of 1996 was due to his excessive absenteeism and was not related to his workers compensation injury.

"The ALJ, as the finder of fact, and not the reviewing court, has the sole authority to determine the quality, character, and substance of the evidence[,]" in workers' compensation proceedings. Square D Co. v Tipton, Ky., 862 S.W.2d 308, 309 (1993) (citation omitted). Further, the reviewing court is limited to determining whether the ALJ "committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992). As we noted in our previous opinion, it is not our role to assess the weight to be given to the facts and to the evidence. This is a determination left to the fact-finder. We agree with the Board that ALJ Overfield's findings are responsive to the directive in our earlier opinion and that they are supported by substantial evidence.

Next, Hansel contends that the Board erred by affirming ALJ Overfield's construction of KRS 342.730(1)(b). He argues that ALJ Overfield misinterpreted and misapplied the "return to work" concept embodied in the provisions of KRS 342.730(1)(b). We disagree.

As observed in Ashland Exploration v. Tackett, Ky. App., 971 S.W.2d 832 (1998), the provisions of KRS 342.730(1)(b) were aimed at curbing economic abuses of the workers' compensation system. Through this provision, the General Assembly

> intended to limit the amount of workers' compensation benefits an able-bodied claimant may receive if he, at least, returns to work at his pre-injury wage and is physically capable of remaining in the job he returns to permanently or indefinitely.

Id. at 834. We agree with the Board that ALJ Overfield accurately assessed the impact of the Tackett decision in his ultimate conclusion. Under the specific facts of this case, it was properly within the purview of ALJ Overfield's discretion to find that Hansel had returned to work at his pre-injury wage and was capable of remaining at this job permanently or indefinitely had his chronic absenteeism not deprived him of that position. The Board did not err in affirming the ALJ's application of KRS 342.730(1)(b) to the facts of this case.

For the foregoing reasons, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE FRUIT OF THE LOOM:

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