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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000608-WC

LAUREL COOKIE FACTORY — APPELLANT

v. — PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD CLAIM NO. WC-00-69127

ANNA FORMAN; JOHN B. COLEMAN, Administrative Law Judge; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BARBER, HUDDLESTON and MILLER, Judges.

HUDDLESTON, Judge: Laurel Cookie Factory appeals from a Workers' Compensation Board decision affirming an administrative law judge's opinion and award arguing that the ALJ committed errors warranting vacating the award to Anna Forman of permanent partial disability benefits. Laurel contends alternatively that Forman should only have been awarded temporary total disability benefits and, in any event, that her award of permanent partial disability benefits should not have been doubled. Laurel also contends that the ALJ

erred in his determination of when Forman reached maximum medical improvement.

Forman slipped in water in a Laurel break room and fell, resulting in the immediate onset of pain. Temporary total disability benefits were paid to Forman from September 7, 2000, through November 5, 2000, at the rate of $200.01 per week.[1] Since her injury, Forman has been treated or seen by Drs. Werner Grentz, Steven Kiefer, Robert Hoskins, Robert Nickerson, Gregory Snider and William Lester. She continues to suffer from significant pain in her lumbar spine and right leg, pain in her right knee and head and neck pain. Forman has not returned to work; she believes herself unable to do so.

Laurel argues that the ALJ erred in considering a permanent impairment rating from Dr. Nickerson, who testified that Forman had not reached maximum medical improvement (MMI). Laurel contends that an impairment rating should not be assessed until clinical findings show that the injured person has reached MMI. Although Dr. Nickerson indicated that he did not believe that Forman had reached MMI as of March 1, 2001, when he examined her, Dr. Kiefer opined that Forman reached MMI in early November 2000 and Dr. Grentz stated that Forman reached MMI by January 4, 2001. The ALJ found the testimony of Dr. Grentz convincing and set the MMI date at January 4, 2001. In assessing whether Forman had a permanent partial disability, the ALJ accepted the testimony of Dr.

[1] Forman's average weekly wage was $300.13. The ALJ found, and the parties agree, that Forman should have been paid more than $200.01 per week. The ALJ found the proper amount to be $220.08 per week.

Nickerson, who indicated that Forman had an 8% permanent partial impairment.

The role of this Court in reviewing a Workers' Compensation Board decision "is to correct the Board [or the ALJ] only where [we perceive that] the Board [or the ALJ] has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice."[2] The ALJ, the fact-finder, not the reviewing Court "has the sole discretion to determine the quality, character, and substance of evidence."[3] The ALJ "may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it came from the same witness or the same adversary party's total proof." When the claimant, who "bears the burden of proof and risk of nonpersuasion before the fact-finder with regard to every element of the claim," is "successful before the ALJ, the issue on appeal is whether substantial evidence support[s] the ALJ's conclusion."[4] Substantial evidence means "evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men."[5] Even though a party "may note evidence which would have supported a conclusion contrary

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[2] Western Baptist Hospital v. Kelly, Ky., 827 S.W. 2d 685, 687-88 (1992).

[3] Whittaker v. Rowland, Ky., 998 S.W. 2d 479, 481 (1999).

[4] Id.

[5] Id.

to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal."[6]

The ALJ accepted Dr. Grentz's opinion as to when Forman reached MMI. The ALJ accepted Dr. Nickerson's opinion that Forman had an 8% permanent partial impairment. The ALJ was free to accept these parts of Dr. Grentz's testimony and Dr. Nickerson's testimony while rejecting Dr. Grentz's finding of 0% impairment and Dr. Nickerson's finding that Forman had not reached MMI. Because the ALJ found that Forman reached MMI on January 4, 2001, before her evaluation by Dr. Nickerson, we reject Laurel's argument that the ALJ adopted a permanent partial impairment rating for a person who had not reached MMI.

Laurel argues that Forman must produce, pursuant to Kentucky Revised Statutes (KRS) 342.011(1), evidence of a compensable injury through objective medical findings. After performing a physical examination, reviewing various diagnostic studies and the notes of Drs. Lester, Grentz and Kiefer, Dr. Nickerson diagnosed Forman as suffering from a lumbosacral musculoigamentous sprain/strain, a right knee contusion and chronic pain syndrome. Dr. Nickerson also noted Forman's inability to perform toe raises and fixed her permanent partial impairment at 8%. When Dr. Hoskins treated Forman almost three months after Dr. Nickerson, he found muscle spasms and diagnosed Forman as suffering from back pain. Within the parameters of this Court's standard of review, the medical testimony of Drs. Nickerson and Hoskins

[6] Id. at 482.

constitutes substantial evidence to support the findings of the ALJ.[7]

Laurel argues that Forman did not suffer a work-related injury. Laurel's contention rests primarily upon the testimony of Dr. Snider that Forman did not suffer a work-related injury and the discrepancies between the testimony of Forman and Tammy Jackson, a witness to the incident. Laurel contends that Forman is either mistaken in her account or lying and that the medical experts who did find a work-related injury are being unduly influenced by her retelling of the tale.

Again, Laurel fails to properly recognize the role of this Court in reviewing decisions of the Board and ALJ. Forman testified that she fell; two doctors found that she had suffered a work-related injury. The ALJ was free to believe this testimony and discount the discrepancies between Jackson's and Forman's testimony and the opinion of Dr. Snider that a work-related injury did not occur.[8] There is substantial evidence in the record to support the finding of the ALJ that a work-related injury occurred.[9]

The ALJ doubled Forman's benefits under Kentucky Revised Statute (KRS) 342.730(1)(c)(2). Laurel asserts that the permanent partial disability award should be reduced by eliminating this doubling of the award arguing that the doubling is improper as Forman did not return to work. Forman contends that the ALJ's and

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[7] Id. at 481.

[8] Id.

[9] Id.

the Board's statutory interpretation is reasonable; furthermore, she states that she did return to work, albeit briefly. The findings of the ALJ, however, contradict Forman's assertion regarding her return to work. The ALJ determined that Forman has not returned to work at an average weekly wage equal to or greater than the average weekly wage she had at the time of her injury, and, in fact, has not returned to work at all. This Court may not substitute itself as a fact-finder in place of the ALJ.[10] However, this Court's role does include considering whether the ALJ or the Board have "overlooked or misconstrued controlling statutes or precedent . . . ."[11] Therefore, the issue before this Court is not whether Forman returned to work. Rather, it is whether KRS 342.730(1)(c)(2) provides for doubling of benefits for workers who do not return to work at a wage equal to or greater than their average weekly wage at the time of their injury.

We agree with the Board's reasoning and adopt the following portion of its opinion:

> Finally, we address Laurel's argument that the ALJ erred in applying the 2 multiplier pursuant to KRS 342.730(1)(c)2. That section provides:
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> > If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefits for permanent partial disability shall be determined under paragraph

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[10] Id.

[11] Western Baptist Hospital, supra, n. 2.

(b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments. (Emphasis ours.)

In interpreting statutory provisions, reviewing bodies must ascertain the intention of the statute from its wording and unless it contains some ambiguity, it is not open to construction. A reviewing body must give credence to the actual words used and avoid offering an alternative which the reviewing body might believe to be a better result.[12] This Board, as a reviewing body, does not have the right to offer an alternative explanation of what the Legislature might have intended or said but, rather, we must follow what the Legislature did say.[13]

If, however, there is an ambiguity, then it is appropriate to consider legislative history, the language

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[12] Overnight Transportation Co. v. Gaddis, Ky. App., 793 S.W.2d 129 (1990) and Ky. Ass'n of Chiropractors, Etc., v. Jefferson Cty. Medical Soc., Ky., 549 S.W.2d 817 (1977).

[13] Clark v. Clark, Ky. App., 601 S.W.2d 614 (1980).

of the statute, the general purpose of the provision and, also, we may look to the statutory provision as a whole, the circumstances which gave rise to its enactment and the mischief to be remedied.[14] The result offered by Laurel is that since Forman had not returned to work at a wage equal to or greater than her wage at the time of the injury the provision quoted above has no application to her claim and, thus, she would be limited to 8% impairment times the .85 factor at KRS 342.730(1)(b). The ALJ, however, apparently concluded the applicable portion of KRS 342.730(1)(c)2 was the second sentence and, thus, the 2 multiplier is applicable. The effect of Laurel's interpretation would be that if an individual sustains an injury but returns to work at the same or greater wage and then, for whatever reason, ceases employment then the 2 multiplier would be appropriate. If an identical individual, however, is never able to return to work at the same or greater wage then, absent the 3 multiplier from (c)1, that individual would be limited to only the factor contained in (1)(b).

Admittedly, one way of looking at the language of 342.730(1)(c)2 could lead to an interpretation offered by Laurel. We do not, however, believe it is so clear and unambiguous that it is the only interpretation and, further, we believe reaching such a result, if not

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[14] See Princess Manufacturing Co. v. Jarrell, Ky., 465 S.W.2d 45 (1971) and Button v. Hikes, 296 Ky. 163, 176 S.W.2d 112 (1943).

absurd, is certainly illogical. The statutory provision in question was enacted by the regular session of the 2000 Legislature. Prior to this enactment, KRS 342.730(1)(c) and the mathematical factors in KRS 342.730(1)(b) first appeared in December of 1996 with the sweeping changes that took place with the Workers' Compensation Act. At that time, the factors in (1)(b) were greater than the factors that now exist. However, rather than having a 2 multiplier, an individual who returned to work at the same or greater wage had his or her benefits cut in half pursuant to KRS 342.730(1)(c)2. In modifying subsection (c) in 2000, the Legislature intended as part of its purpose to additionally consider such factors as age and education, now contained in (1)(c)3. In order for those factors to play a role it was necessary as a mathematical function to remove the fractions that existed prior to that time and begin using whole numbers. It was clearly never the intent of the Legislature to reduce weekly benefits to injured workers who had not returned to work at the same or greater wage. To follow Laurel's logic, an individual such as Forman would be obligated to return to work at least one day and then for whatever reason leave that employment and then have the 2 multiplier.

Ultimately, however, we do not believe it is necessary to conclude the statute in its application is illogical or absurd. Rather, we believe the second

sentence in which it uses the terminology "that employment" is talking about the employment the individual was involved in and at the wage being received at the time of the injury. This, in our opinion, is consistent with the first sentence, which is comparing the weekly wage of employment both before and after the injury. We, therefore, conclude the ALJ's application of the 2 multiplier under these circumstances was appropriate.

The Board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bradford L. Breeding
London, Kentucky

BRIEF FOR APPELLEE:

Timothy J. Wilson
WILSON, SOWARDS, POLITES & MCQUEEN
Lexington, Kentucky