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Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001537-WC

TELEPLAN — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD CLAIM NO. WC-01-01189

VICKIE CONNER; JAMES L. KERR, Administrative Law Judge; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BARBER, BUCKINGHAM and HUDDLESTON, Judges.

HUDDLESTON, Judge: Teleplan appeals from a Workers' Compensation Board opinion affirming an award of an administrative law judge to Vicki Conner of permanent partial disability benefits based on a 3% impairment caused by a work-related cumulative trauma injury. Finding that Conner "lacks the physical capacity to [return] to the type of work performed at the time of the injury based upon the permanent restrictions of Dr. [Warren] Breidenbach," the ALJ enhanced her award by a multiplier of three pursuant to Kentucky Revised Statutes (KRS) 342.730(1)(c)1.

Conner was born on October 18, 1966, and is a high school graduate with vocational training in "health occupations" which she received while in high school. Her work experience includes employment as a fast food worker, cashier and retail clerk, machine operator, special order clerk for a building supplies company, ice bin cleaner for a vending machine company, customer service agent for a health insurer and owner/operator of a licensed home childcare facility.

Conner began working for Teleplan as a temporary employee on November 28, 2000, and became a permanent employee on March 12, 2001. Her job duties involved working at a table inspecting computer hard drives which entailed removing the hard drives from the boxes and packing material and reinserting them upon completing the inspection. Conner's height (5'1"), in conjunction with the height of the table resulted in her doing the work at approximately shoulder level.

She first noticed symptoms on March 14, 2001, and promptly notified her supervisor. She complained of pain in her right arm with a constant ache from the wrist to the elbow. On March 21, 2001, she sought treatment at Baptistworx and was advised to restrict her movements, use Motrin and work light duty which she began doing immediately. Conner denied having any history of wrist, arm or elbow problems.

Although she was restored to regular duty on April 12, 2001, her pain continued to increase and the restrictions were again imposed on May 16, 2001. Because Teleplan was unable to accommodate her restrictions, she was off work from May 17, 2001,

until August 13, 2001, at which time she returned but with permanent restrictions and wearing arm splints. She worked in various capacities, ultimately resuming her previous job as a packer which she is currently doing full-time within her restrictions at the same or greater wages than before the injury. Upon her return to work, Teleplan lowered the height of Conner's worktable to accommodate her condition.

Conner filed an application for resolution of injury claim with the Department of Workers' Claims on September 7, 2001, and the claim was assigned to an ALJ for final adjudication two weeks later. Conner testified both by deposition and at the hearing. In addition to Conner's testimony, the evidence considered by the ALJ consisted of medical records and/or reports from Dr. Warren Bilkey, Dr. Warren Breidenbach, Baptistworx, Dr. David Westin, Dr. Daniel Wolens, Dr. Morton Kasdan and the lay testimony of Jeffrey Hooper, the mass storage supervisor at Teleplan and Conner's immediate supervisor.

Based on the testimony of Dr. Bilkey, the ALJ found that Conner "has a 3% impairment as a result of the work-related injury of March 14, 2001." Relying on the restrictions imposed by Dr. Breidenbach, the ALJ further found that Conner lacks the physical capacity to return to the type of work she performed at the time of the injury. While acknowledging that Conner "has returned to the work earning the same or greater wages," the ALJ emphasized that "her work station has had to be modified to accommodate her and [Conner] essentially works on a light duty basis within her restrictions" in finding that she is entitled to an enhanced award

pursuant to KRS 342.730(1)(c)1. Teleplan appealed to the Board arguing that the ALJ erred in multiplying Conner's award by three since Conner returned to the same job that she was performing at the time of her injury.

As the ALJ specifically relied on the testimony of Dr. Bilkey in assessing the degree of impairment and the testimony of Dr. Breidenbach (Conner's primary treating physician since August 9, 2001) in applying the triple disability multiplier contained in KRS 342.730(1)(c)1, our review must necessarily begin there. The ALJ's summary of their testimony is set forth below:

> 6. Dr. Warren Bilkey performed an independent medical evaluation on [Conner] on November 12, 2001. He diagnosed chronic wrist and elbow pain, consistent with the diagnosis of bilateral elbow epicondylitis. Electrodi[a]gnostic studies were negative and he did not believe [Conner's] cervical spine was implicated. Dr. Bilkey found that [Conner] is at maximum medical improvement and he related her symptoms to the work injury of March 14, 2001. He further assessed a 3% permanent impairment for chronic pain. Also, [Conner] may not lift over 10 pounds on a frequent basis and 20 pounds on occasion and should avoid overtime work. [Conner] should also wear protective splints on both wrists. As an alternative to his 3% impairment rating, Dr. Bilkey offered that [Conner] could be evaluated using grip strength which would yield a 12% whole person impairment.

7. Dr. Warren Breidenbach initially saw [Conner] on August 9, 2001. He diagnosed bilateral epicondylitis and mild bilateral carpal tunnel syndrome. Dr. Breidenbach causally connected [Conner's] symptoms to her injury and he placed [Conner] on a restricted work status. Dr. Breidenbach continued to treat [Conner] on August 23, 2001, September 26, 2001, October 31, 2001[,] and January 9, 2002. As of the later date, Dr. Breidenbach stated [Conner's] permanent restrictions include light work with lifting of 20 pounds on a maximum basis and 10 or less pounds on a frequent basis.

After conducting an "independent review of the evidence and the applicable law," the Board found as follows:

> . . . [B]ased upon the medical opinions of Dr. Breidenbach and Dr. Bilkey, together with Conner's own testimony, we believe that the ALJ acted well within his discretion in determining that [Conner] now lacks the physical capacity to perform the full range of her prior type of work. Given her current circumstances, we believe it was reasonable for the fact-finder to conclude that her current situation is simply a form of "sheltered employment," specifically designed to assist her to continue in her pre-injury job classification. The fact that the employer in this instance is acting out of genuine concern for its employee is unfortunately of no legal consequence. In that there is substantial evidence to support the ALJ's decision to apply the three

multiplier to [Conner's] disability rating, we are without authority to hold otherwise.

Teleplan appeals from that determination. On appeal, the sole issue as framed by Teleplan is "whether the [Board] erred in affirming ALJ Kerr's ruling that [Conner] has lost the physical capacity to return to the type of work she performed at the time of the injury."

On the current facts, our standard of review is well established. In a workers' compensation claim, the claimant bears the burden of proving every essential element of a claim.[1] As the fact-finder, the ALJ has the sole authority to determine the quality, credibility and substance of the evidence as well as the inferences to be drawn.[2] The ALJ may choose to believe parts of the evidence and disbelieve other parts, even when it comes from the same witness or the same party's total proof.[3]

When, as is the case here, the decision of the fact-finder is in favor of the party with the burden of proof, the issue on appeal is whether the ALJ's decision is supported by substantial evidence, which is defined as some evidence of substance and consequence sufficient to induce conviction in the minds of

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[1] Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88, 96 (2000); Snawder v. Stice, Ky. App., 576 S.W.2d 276, 280 (1979).

[2] Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985).

[3] Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977).

reasonable people.[4] Furthermore, the Board may not substitute its judgment for that of the ALJ in matters involving the weight to be afforded the evidence on questions of fact.[5] A party challenging the ALJ's factual findings must do more than present evidence supporting a contrary conclusion to justify reversal.[6] When reviewing the Board's decision, our function is limited to correcting the Board where we perceive that 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."[7]

KRS 342.730(1)(c)1 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[.]

Thus, the inquiry becomes whether the ALJ's determination that the aforementioned condition, i. e., inability to return to the type of work performed at the time of injury, is supported by

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

[5] KRS 342.285(2).

[6] Ira A. Watson Dep't Store v. Hamilton, Ky., 34 S.W.3d 48, 52 (2000).

[7] Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992).

substantial evidence. Further, this dispositive issue encompasses the question of whether returning to work for the same employer performing duties within the same job classification constitutes a return "to the type of work" being performed at the time of injury, thereby precluding application of this subsection.

In this case, no credible argument can be made that the record does not resolve the former question in favor of Conner as reflected by the following excerpt from the Board's opinion:

> . . . Dr. Breidenbach imposed permanent restrictions of no lifting more than twenty pounds, wearing splints on both arms, and no working any overtime. Dr. Bilkey corroborates Dr. Breidenbach's diagnosis of epicondylitis and recommends the same restrictions. Moreover, both Conner and Hooper testified that upon [Conner's] return to work, numerous accommodations were made to oblige her restrictions. What is more, Conner testified that when she is required to lift more than twenty pounds, she must ask another employee to perform the activity for her.

As this medical and lay testimony constitutes substantial evidence which supports the ALJ's decision, the Board was precluded from substituting its judgment for that of the ALJ as to the weight the evidence should be afforded. Likewise, because we perceive no error in the Board's assessment of the evidence, no correction is needed, nor is one authorized.

We now turn to the remaining question of whether the Board "overlooked or misconstrued controlling statutes or precedent" in applying KRS 342.730(1)(c)1. on the facts presented.

In the Board's view, KRS 342.730(1)(c)1 "requires more than a cursory review of job titles. Instead, that provision requires a review of the physical requirements of a particular job" when making that determination. In our opinion, such an approach is justified.

"The Workers' Compensation Act is social legislation, the purpose of which is to compensate workers who are injured in the course of their employment for necessary medical treatment and for a loss of wage-earning capacity, without regard to fault."[8] In Osborne v. Johnson,[9] this Court reiterated that one of the primary purposes of the Act is to compensate injured employees for their loss of earning capacity, not just a present loss of income.[10] All presumptions are to be indulged in favor of those for whose protection the enactment was made.[11]

Consistent with the foregoing principles, we believe that KRS 342.730(1)(c)1 is applicable in the instant case. As observed by the Board: "Conner has not returned to work symptom free and absent the special accommodations that have been made for her, she would not be able to return to her job as a packer. Moreover, her permanent restrictions will likely decrease her

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[8] Adkins v. R & S Body Co., Ky., 58 S.W.3d 428, 430 (2001).

[9] Ky., 432 S.W.2d 800, 804 (1968).

[10] While a workman who has sustained a permanent bodily injury of appreciable proportions may suffer no reduction of immediate earning capacity, it is likely that his ultimate earning capacity will either be reduced by a shortening of his work life or a reduction of employment opportunities through a combination of age and physical impairment. Id.

[11] Vance v. Unemployment Ins. Comm'n, Ky. App., 814 S.W.2d 284, 286 (1991)(citation omitted).

future job opportunities." It could be argued that this result is counterintuitive given that Conner will receive triple the normal benefit despite the fact that her wages have not been diminished. However, the General Assembly has acknowledged that a loss of earning capacity warrants a significant increase in income benefits as evidenced by the amended income benefit multipliers found in KRS 342.730(1)(c)1 and 2[12] as well as the factors which are added to the multipliers pursuant to KRS 342.730(1)(c)3.

Because the application of KRS 342.730(1)(c)1 in the present context is consistent with the explicit purpose of the Act, the presumption in favor of the claimant (Conner) and the overall statutory scheme, the ALJ did not err in multiplying Conner's benefit award by three in accordance with this statutory provision, nor did the Board "overlook or misconstrue" this governing authority. Thus, the Board's opinion is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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[12] Although the current version of the statute at issue became effective on July 14, 2000, the language employed prior to the amendment was nearly identical, with the only changes being the multipliers to be applied to the benefit amounts and the insertion of the word "or" at the end of subsection 1. Originally, subsection 1 contained a x 1.5 multiplier and subsection 2 mandated that the weekly benefits be reduced by one-half for each week during which that employment was sustained.