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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001025-WC

BROOKLAWN YOUTH SERVICES — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-94857

MELISSA HANEBERG;
HON. MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, MINTON, AND TAYLOR, JUDGES.

BARBER, JUDGE: Appellee, Melissa Haneberg (Haneberg), began working for Appellant, Brooklawn Youth Services (Brooklawn), in July 1999 as a residential counselor for boys, ages eight to fourteen. The boys were placed in the facility as a result of emotional, physical, or sexual abuse. Haneberg has a bachelor's degree in psychology and is working on a master's degree in social work.

Haneberg's first injury occurred October 5, 1999, when she was restraining a twelve-year-old boy who refused to go to

his room. The boy, who weighed between 100 to 110 pounds, was placed in a "kneeling cradle" position by Haneberg. Haneberg stood behind the boy and locked her arms around his waist. At the same time, a co-worker restrained the boy's legs. During this incident, Haneberg suffered an onset of severe low back pain. Haneberg was able to complete her shift but went to the immediate care center the following day. The physician at the immediate care center diagnosed Haneberg with a lumbar strain and released her to return to work with restrictions of no lifting over 100 pounds.

Haneberg continued to work until February 8, 2000, when she sustained a second low back injury while restraining a resident in a chair. Following this incident, she remained off work from February 14, 2000 until June 19, 2000. Haneberg received temporary total disability benefits. While off work, Haneberg was seen by Dr. Joseph Werner, an orthopedic surgeon, on May 30, 2001.

Haneberg then worked from June 20, 2000 to December 13, 2000. While working, her condition continued to worsen. As a result, Dr. Werner performed fusion surgery on Haneberg December 14, 2000. He performed an anterior discectomy at L5-S1 and fusion of L5-S1 with insertion of titanium cages and bone grafts. Haneberg received temporary total disability benefits

from December 13, 2000 until October 23, 2001. Haneberg then filed her workers' compensation claim December 21, 2001.

Dr. Werner performed a repeat fusion surgery on October 8, 2002 because Haneberg was still experiencing pain. The L5-S1 fusion consisted of instrumentalities and a left iliac crest bone graft. Haneberg received temporary total disability benefits from October 8, 2002 through December 16, 2003. Haneberg did not return to work following her second surgery.

During the discovery portion of Haneberg's claim, independent medical examinations (IME) were performed by Dr. Bart J. Goldman, Dr. Robert F. Baker,[1] and Dr. Tinsley Stewart. A deposition of Dr. Baker was also taken on April 22, 2002. In addition to the above, medical records from Haneberg's treating physician, Dr. Werner, as well as his August 8, 2002 deposition were submitted into the record. Following discovery, a final hearing on her claim was held on May 4, 2004 before Hon. Marcel Smith, Administrative Law Judge (ALJ).

In her June 28, 2004 Opinion and Award, the ALJ assigned an impairment rating of 30% to Haneberg based upon KRS 342.730(1)(b) and the medical evidence provided by Dr. Baker.[2] The ALJ also found that Haneberg retained the physical capacity to return to the type of work she performed at the time of her

[1] Dr. Baker performed two IMEs, the first IME was performed after Haneberg's first surgery and the other IME was performed after her second surgery.

[2] Dr. Baker's IMEs were performed at the request of Brooklawn.

injury based upon Dr. Baker's findings and thus was not entitled to the 1.5 multiplier contained in KRS 342.730(1)(c)(1). In support of her decision regarding the multiplier, the ALJ cited Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), and Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). The ALJ ruled that Haneberg was entitled to temporary total disability benefits for October 23, 2001 through October 8, 2002 based on the statements of Dr. Werner. The ALJ also held that Haneberg was not entitled to vocational rehabilitation and was liable for various medical bills.

Haneberg filed an appeal July 19, 2004. She alleged error by the ALJ in refusing to apply the 1.5 multiplier of KRS 342.730(1)(c)(1) to her case as well as denying her vocational rehabilitation benefits. However, Haneberg failed to make any substantive argument in her brief related to the denial of vocational rehabilitation benefits. The Workers' Compensation Board (WCB) issued its opinion October 22, 2004. The sole issue the WCB examined was the ALJ's alleged error in failing to award the 1.5 multiplier of KRS 342.730 (1)(c)(1) for Haneberg's work injury.

The WCB found that any analysis pursuant to Fawbush was inappropriate because that case dealt with an analysis of the 2000 version of the Workers' Compensation Act (Act), rather than the 1996 Act applicable to Haneberg's case. The WCB stated

the correct case for the ALJ to utilize was Ford Motor Co. v. Forman, 142 S.W.3d 141 (Ky. 2004). As such, the WCB remanded the matter to the ALJ for further findings concerning the application of the 1.5 multiplier pursuant to KRS 342.730(1)(c)(1) of the 1996 Act in accordance with the law set forth in Forman. Specifically, the WCB stated the ALJ must make a determination whether Haneberg was capable of returning to her actual pre-injury job which required restraining children. Neither party appealed the WCB's Order remanding the matter to the ALJ.

The ALJ issued her Order on Remand December 7, 2004.[3] The ALJ found that under the reasoning of Forman, Haneberg would not, under Dr. Baker's restrictions, be able to restrain unruly children and would not be able to return to her actual pre-injury job. As such, the ALJ found that the 1.5 multiplier of KRS 342.730(1)(c)(1) as it existed at the time of Haneberg's injury[4] was applicable and amended the original ALJ opinion to reflect the same.

Brooklawn appealed the ALJ's Order on Remand January 7, 2005. Brooklawn requested the WCB to reverse the ALJ's December 7, 2004 order and remand with directions to enter an order stating the conclusion of law that Haneberg has not lost

[3] The original Order on Remand had an incorrect date of September 10, 2004 that was corrected per order entered January 11, 2005.

[4] The 1996 version of the Act.

the physical capacity to return to the type of work she performed at the time of the injury. Brooklawn further requested that the WCB reinstate the ALJ's original Opinion and Award. The WCB issued an opinion April 15, 2005 affirming the ALJ's Order on Remand. Brooklawn appealed the WCB opinion May 17, 2005.

Brooklawn makes three arguments in its brief: (1) the WCB erred in reversing the original opinion of the ALJ that Haneberg had not lost the physical capacity to return to the type of work she performed prior to the injury; (2) the issue on appeal is a question of law, not a question of fact; and (3) the WCB erred in its second opinion on remand by affirming the ALJ's order on remand making a conclusion of law that the medical opinion of Dr. Baker supports entitlement to the 1.5 enhancement multiplier based upon loss of physical capacity to return to the type of work Haneberg performed prior to the injury.

Haneberg argues that the first issue should be whether Brooklawn was entitled to appeal the second WCB order which affirmed the ALJ's award after remand. Haneberg states that Brooklawn's current appeal is precluded because the first WCB order was the "law of the case." We now turn our attention to the original WCB opinion.

Brooklawn first argues that the WCB's interpretation of "type of work" of KRS 342.730(1)(c)(1)[5] to mean Haneberg's actual pre-injury job relying upon Forman was in error. Specifically, Brooklawn argues that "type of work" refers to the employee's line of work rather than the employee's actual pre-injury job.

Where a decision of the WCB sets aside an ALJ's decision and either directs or authorizes the ALJ to enter a different award upon remand, it divests the party who prevailed before the ALJ of a vested right and, therefore, the decision is final and appealable to the Court of Appeals. Whittaker v. Morgan, 52 S.W.3d 567, 569 (Ky. 2001).[6] In contrast, a WCB

[5] In its brief, Brooklawn mistakenly cites the 2000 Act of KRS 342.730 rather than the applicable 1996 Act in effect at the time of Haneberg's injuries.

[6] In Whittaker, the WCB issued an opinion that the Special Fund was entitled to credit against the income benefits that were awarded at reopening for benefits that were awarded under the settlement, but that the credit must be calculated as set forth in KRS 342.125(2)(b), rejecting the Special Fund's argument that a different calculation be used. The WCB remanded the claim to the ALJ to calculate the credit for the Special Fund.

The WCB's decision divested the claimant of his victory before the ALJ on the question of credit and did not divest the Special Fund of anything that the ALJ had previously decided in its favor. The Special Fund, not the claimant, appealed to the Court of Appeals. It was determined that if the Special Fund had failed to appeal the WCB's decision with regard to the legal question concerning the manner in which the credit should be calculated, it would have been precluded by the "law of the case" doctrine from raising the issue again after the ALJ's decision on remand. The Supreme Court stated that a party who is aggrieved by an adverse appellate determination must appeal at the time the decision is rendered because an objection on remand is futile, and an appeal from the implementation of the appellate decision on remand amounts to an attempt to relitigate a previously-decided issue. It was determined that in view of the fact that the WCB decided the legal question that was raised by the Special Fund and rejected its argument, the question subject to appeal following the remand would have been whether the ALJ properly construed and applied the order of remand.

opinion is interlocutory if it remands the case to the ALJ with directions to comply with statutory requirements without authorizing the taking of additional proof or the entry of a different award. Davis v. Island Creek Coal Co., 969 S.W.2d 712, 714 (Ky. 1998).

In its original opinion, the WCB stated "the ALJ, while determining Haneberg could return to her former job classification of social work/counselor, does not state with specificity whether she could return to her **actual job which required restraining children**." (Emphasis added.) The WCB continued by stating the "matter must be remanded to the ALJ for a factual finding addressing Haneberg's capability of returning to her **actual pre-injury job**." (Emphasis added.) The WCB then remanded to the ALJ for further findings concerning the application of the 1.5 multiplier pursuant to KRS 342.730(1)(c)(1), as it existed at the time of the injury in accordance with the law set forth in Forman. This opinion set aside the ALJ's decision[7] and authorized the ALJ to enter a different award upon remand and, therefore, the WCB opinion decision was final and appealable.

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[7] The ALJ had relied, in part, upon Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) in making her decision not to apply the multiplier of KRS 342.730(1)(c)(1). The WCB found that such an analysis was inappropriate because Fawbush concerned an analysis of the 2000 Act, rather than the 1996 Act applicable at the time of Haneberg's injuries.

Brooklawn's failure to appeal the WCB's original opinion caused the WCB's interpretation of the law related to KRS 342.730(1)(c)(1), specifically that the term "type of work" means a claimant's actual pre-injury job, to become the law of the case. Whittaker, supra 52 S.W.3d at 569. As such, the opinion of the WCB that "type of work" meant a claimant's actual pre-injury job became controlling at all subsequent stages of the litigation, and the questions to be considered following the remand were limited to whether the ALJ properly construed and applied the Board's mandate. Inman v. Inman, 648 S.W.2d 847, 849 (Ky. 1982).

Brooklawn argues that Haneberg had not lost the physical capacity to return to the "type of work" she performed prior to the injury, therefore the WCB erred in reversing the original opinion of the ALJ. In its brief, Brooklawn argues about the appropriate definition for "type of work" in KRS 342.730(1)(c)(1). We believe Brooklawn's first argument was not properly preserved, because they failed to appeal the original WCB opinion. As such, the argument will not be addressed in this opinion. The "law of the case" doctrine mandates that the WCB's interpretation of the law related to KRS 342.730(1)(c)(1), specifically that the term "type of work" means a claimant's actual pre-injury job, to become the law of the case at all subsequent stages of litigation. Additionally, we would like to

note that the failure of legislature to amend a judicially interpreted statute, such as was done in Forman, strongly implies legislative agreement with the interpretation. Rye v. Weasel, 934 S.W.2d 257, 262 (Ky. 1996).

Brooklawn's second argument is that the issue on appeal is a question of law, not a question of fact. We disagree. In essence, Brooklawn is appealing the application of the KRS 342.730(1)(c)(1) multiplier to Haneberg's case. The issue of a claimant's retained capacity and the application of the 1.5 multiplier in KRS 342.730(1)(c)(1) is one of fact based on the evidence, both lay and medical. Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122, 126 (Ky.App. 2000). Therefore, we believe there is no merit to Brooklawn's argument.

The final argument made by Brooklawn is that the WCB erred in its second opinion by affirming the ALJ's order on remand making a conclusion of law that the medical opinion of Dr. Baker supports entitlement to the 1.5 enhancement multiplier based upon loss of physical capacity to return to the type of work Haneberg performed prior to the injury.

As stated above, Brooklawn's failure to appeal the WCB's original opinion caused the WCB's interpretation of the law related to KRS 342.730(1)(c)(1), specifically that the term "type of work" means a claimant's actual pre-injury job, to become the law of the case. Whittaker, supra 52 S.W.3d at 569.

As such, the decision of the WCB was controlling at all subsequent stages of the litigation, and the question to be considered following the remand was limited to whether the ALJ properly construed and applied the Board's mandate. Inman, supra 648 S.W.2d at 849.

The WCB opined that the applicable case law in Haneberg's matter was Ford Motor Company v. Forman, 142 S.W.3d 141 (Ky. 2004). Using Forman, the WCB directed the ALJ to determine whether Haneberg retained the ability to return to her actual pre-injury job which included restraining children. With this instruction, the ALJ stated the following in her Order on Remand:

> This Administrative Law Judge having reviewed the Opinion and being sufficiently advised finds that under the reasoning of Ford Motor Company v. Forman, Ky., 142 S.W.3d 141 (Ky. 2004), [Haneberg] would not, under Dr. Baker's restrictions be able to restrain unruly children and is therefore not able to return to [her] actual pre-injury job. Therefore, the 1.5 multiplier of KRS 342.730(1)(c)1 as it existed at the time of the injury is appropriate and will be applied.

When a claimant succeeds in her burden of proof in a workers compensation claim, and an adverse party appeals, the question before the court is whether the decision of the ALJ is supported by substantial evidence. Transportation Cabinet v. Poe, 69 S.W.3d 60, 62 (Ky. 2001). Substantial evidence is

evidence of relevant consequence sufficient to induce conviction in the minds of reasonable people. Id. The ALJ has the sole authority to determine the weight, credibility, and substance of the evidence and to draw reasonable inferences from the evidence. Id., see also KRS 342.285. The ALJ has the discretion to choose whom and what to believe. Id., (citing Pruitt v. Bugg Brothers, 547 S.W.2d 123, 125 (Ky. 1977)). The ALJ, as fact-finder, may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Burton v. Foster Wheeler Corp., 72 S.W.3d 925, 929 (Ky. 2002), (citing Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977)).

The actual bodily condition of the claimant is proven through medical evidence, but lay testimony may be used on the question of the extent of disability which has resulted from the bodily condition. Hush v. Abrams, 584 S.W.2d 48, 50 (Ky. 1979). Disability is a question of fact and there is no rule which requires the employee to produce medical proof. Id. at 51.

The ALJ relied upon the restrictions of Dr. Baker in concluding that the 1.5 multiplier of KRS 342.730(1)(c)(1) to be applicable to Haneberg. We now turn to evidence submitted relevant to Dr. Baker.

In the report from the March 28, 2002 IME, Dr. Baker noted:

> I discussed the job duties[8] with [Haneberg]. She does not feel that she has the ability to be able to undertake the physical capacity that may be necessary in order to restrain an unruly child. When dealing with pain, we have to take the patient's word for their inability to accomplish tasks.
>
> . . .
>
> On my examination, [Haneberg] did not show any exaggeration or inappropriate behavior in an attempt to magnify her pain during the physical examination. For example, there were no positive Waddell's signs.

In Dr. Baker's April 22, 2002, deposition, he testified that subjectively, based on what Haneberg told him, she would be unable to restrain people. Dr. Baker continued that he did not find any "obvious signs of exaggeration, malingering, and things like that" by Haneberg. Dr. Baker also opined Haneberg was not trying "to pull the wool over [his] eyes."

Dr. Baker then performed a second IME on Haneberg following her second back surgery. In his IME report he made the following comments:

> As stated in my initial IME of March 28, 2002, I cannot find any objective reason

[8] Dr. Baker noted he had a very detailed job description in the record concerning the duties of a residential counselor, including the necessity to be able to restrain children, at times.

> why she could not perform her job duties, but from the patient's point of view and her continued subjective complaints she is in no position to undertake the responsibility of restraining an unruly child.
>
> . . .
>
> Finally, during my most recent history and physical examination, [Haneberg] did not display any type of abnormal pain behavior or show any signs of attempting to magnify her alleged pain symptoms, in my opinion.

Dr. Baker's testimony could have provided a basis for the conclusion sought by Brooklawn, but it also provided a basis for the determination of Haneberg being unable to return to her actual pre-injury job. The ALJ may choose which evidence to believe when it is conflicting, even when it is from the same witness. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). The ALJ chose to believe Dr. Baker's testimony that subjectively Haneberg would be unable to restrain children based upon statements made by her to him during the physical examination. We believe the ALJ's finding that Haneberg was unable to return to her actual pre-injury job was supported by substantial evidence. As such, it was appropriate for the ALJ to apply the 1.5 multiplier of KRS 342.730(1)(c)(1) to Haneberg.

Based on the foregoing, the decision of the WCB is affirmed.

ALL CONCUR.

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