

RENDERED: DECEMBER 5, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001041-WC

HEAVEN HILL DISTILLERIES, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-00194

BONNIE LAWSON; HON. JAMES L.
KERR, ADMINISTRATIVE LAW
JUDGE; AND THE WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: FORMTEXT COMBS, CHIEF JUDGE; DIXON AND TAYLOR,
JUDGES.

TAYLOR, JUDGE: Heaven Hill Distilleries, Inc. (Heaven Hill) petitions this
Court to review an opinion of the Workers' Compensation Board (Board) that
affirmed an opinion of the Administrative Law Judge (ALJ) awarding Bonnie

Lawson permanent partial disability (PPD) and temporary total disability (TTD) benefits. We affirm.

Lawson had been employed by Heaven Hill as a quality control inspector on a labeling line for distilled spirits. In such position, Lawson would inspect various sized bottles, including half-pint and quart bottles, on the assembly line and remove any non-conforming bottle.

Lawson filed a claim for workers' compensation benefits for injuries allegedly suffered during the performance of her job duties. In particular, she claimed to have suffered a back injury on May 6, 2003, right shoulder and neck injury on October 27, 2003, and injury to her palms and wrists as a result of a fall on December 16, 2004. Additionally, Lawson claimed to have suffered a psychological injury caused by adverse emotional effects of her work-related injuries.

By opinion entered October 5, 2007, the ALJ found that Lawson suffered a work-related shoulder injury and psychological injury. The ALJ determined that Lawson suffered a 10 percent PPD due to the psychological injury and awarded income benefits enhanced by the 2 multiplier of Kentucky Revised Statutes (KRS) 342.730(1)(c)(2). The ALJ also awarded medical benefits for the psychological injury. As to the shoulder injury, the ALJ found that such injury produced no permanent impairment and thus, only awarded medical benefits. Additionally, the ALJ found that Lawson failed to demonstrate that the other

alleged injuries were compensable under the Workers' Compensation Act and dismissed same.

Being unsatisfied with the ALJ's opinion, Heaven Hill sought review with the Board. By opinion entered May 2, 2008, the Board affirmed the ALJ's opinion in its entirety. Our review follows.

We shall initially set forth our standard of review. In a workers' compensation case where the claimant prevails, an appellate court will not disturb the ALJ's findings of fact if supported by substantial evidence of a probative value. *Transportation Cabinet v. Doe*, 69 S.W.3d 60 (Ky. 2001). And, the ALJ as fact-finder has the sole authority to judge the weight and credibility of evidence. *Miller v. East Ky. Beverage/Pepsico, Inc.*, 951 S.W.2d 329 (Ky. 1997). It is also within the province of the ALJ to believe a part of an expert's opinion and to disbelieve other parts of such opinion. *Eaton Axle Corp. v. Nally*, 688 S.W.2d 334 (Ky. 1985). On appeal, we will only reverse the Board's opinion where it "has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685 (Ky. 1992).

Heaven Hill contends that the Board erroneously affirmed the ALJ's award of TTD benefits to Lawson. Specifically, Heaven Hill argues that Lawson could have physically returned to her employment on lighter duty during the time period in which TTD benefits were awarded. In support of its argument, Heaven Hill cites to the testimony of Dr. Raymond Shea. It is undisputed that Dr.

Shea ordered Lawson not to return to work for a time period after her injuries.

Heaven Hill argues that Dr. Shea's order was based upon the mistaken belief that a light-duty position was not available to Lawson. Heaven Hill points to the following testimony of Dr. Shea:

- Q. Doctor, during the whole period of time that you've had [Lawson] off work, at least of this year - or you've noted that [Lawson's] been off from January 31 of 2005 to August 29 of '05, when you expected her to be able to return, would [Lawson] be able or would she have been able to have a job involving just the lifting of the half-pints? Would that have been okay for her?
- A. I think, at some point during that period, [Lawson] - she could have, but the way I understand it, that it was not available to her.
- Q. Well, if it had been available, just hypothetically, would she have been able to do that job, do you think, from an orthopaedic standpoint during the periods of time you've been -
- A. Yes.
- Q. - evaluating [Lawson] Okay. And in terms of [Lawson's] actual work, do you just have her statement to you, or do you have anything from the company with regard to her work duties?
- A. I just have a statement from [Lawson].

Heaven Hill maintains that a position was made available to Lawson lifting only half-pint bottles and that Lawson could have worked in this position during the time periods TTD benefits were awarded. As such, Heaven Hill argues that Lawson was not entitled to an award of TTD benefits.

The Board disagreed with Heaven Hill and determined that the ALJ properly found Lawson to be entitled to TTD benefits. In so doing, the Board reasoned:

KRS 342.0011(11)(a) provides “[t]emporary total disability’ means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment[.]” This statute was construed by our [S]upreme [C]ourt in *Central Kentucky Steel v. Wise*, 19 S.W.3d 657 (Ky. 2000), as imposing two conditions to qualify an injured worker to receive TTD benefits. First, the claimant must not have reached MMI and second, the worker must not have improved to the point that he can return to his customary work or the work he was performing at the time of his injury.

Even if we were to conclude Lawson misled Dr. Shea into believing no work she could perform was available, the fact remains that the evidence clearly established Lawson could not perform the work on the half-gallon line following the October 2003 injury, nor during the time periods she was taken off work by her physicians. Since this was the work she was performing at the time of her shoulder injury, we cannot say the ALJ’s award of TTD benefits was so unreasonable under the evidence that it must be reversed as a matter of law. (Citations omitted.)

Resolution of Lawson’s entitlement to TTD benefits revolves around interpretation of KRS 342.0011(11)(a), which reads:

“Temporary total disability” means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment[.]

Recently, our Supreme Court in *Central Kentucky Steel v. Wise*, 19 S.W.3d 657 (Ky. 2000) interpreted the above statute. The Supreme Court held that to be entitled to TTD benefits: (1) claimant must not be at maximum medical improvement,¹ and (2) claimant must not have been released to perform the type of work that was customary or that she was performing at the time of injury. *Id.*, see also *Magellan Behavioral Health v. Helms*, 140 S.W.3d 579 (Ky.App. 2004). To identify the type of work that was customary or was being performed before the injury, our inquiry must focus upon the precise duties claimant carried out in her employment. See *Double L Construction, Inc. v. Mitchell*, 182 S.W.3d 509 (Ky. 2005).

In the case *sub judice*, Lawson's pre-injury employment duties included lifting both half-pint and quart bottles from the assembly line. Even if Lawson were released to perform her job on a light duty by lifting only half-pint bottles, we do not deem such restricted work as tantamount to the type of work she performed customarily or before injury. Consequently, we conclude that the Board properly affirmed the ALJ's award of TTD benefits.

Heaven Hill also argues that the ALJ erred by applying the 2 multiplier of KRS 342.730(1)(c)(2) to increase Lawson's award of income benefits. KRS 342.730(1)(c)(2) reads:

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 benefit for permanent partial disability

¹ It is undisputed that Bonnie Lawson had not reached maximum medical improvement at the time she received temporary total disability benefits.

shall be determined under paragraph (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.

In determining that Lawson was entitled to the 2 multiplier of KRS 342.730(1)(c)(2), the ALJ specifically found:

As to plaintiff's entitlement to benefits per KRS 342.730, the Administrative Law Judge has determined that [Lawson] retained a 10% permanent impairment as a result of her psychological problems which stem from her shoulder injury. The shoulder injury dates clearly to the October 27, 2003[,] injury when [Lawson's] average weekly wage was \$578.00. Further, [Lawson] returned to work earning the same or greater wages and is not presently employed. Wherefore, she qualifies for the 2 multiplier per KRS 342.730(1)(c)(2).

The Board affirmed the ALJ upon application of the 2 multiplier by concluding:

Here, Lawson's only compensable injury occurred on October 27, 2003, and her AWW [average weekly wage] according to the stipulation was \$578.00. Following that injury, Lawson's AWW increased to \$639.78. Though Lawson may have experienced a decrease in AWW following the December 16, 2004 incident, she did not sustain an "injury" to her wrist as that term is defined by KRS Chapter 342. The stipulated raw figures establish beyond cavil that Lawson returned to work following her only compensable injury at an AWW that was greater than her pre-injury AWW and maintained that wage level until she left work. The statute plainly provides for the potential of enhanced benefits if an injured worker returns to work at an AWW equal to or greater than the AWW at the time of the

injury. The only compensable injury was the October 2003 shoulder injury and Drs. Allen's and Cooley's reports fairly establish that this shoulder injury was a substantial contributing factor to Lawson's pain and depression, justifying the award of permanent income benefits. The ALJ committed no error.

Heaven Hill finds error with the ALJ and the Board's opinion and in particular, argues:

Dr. [Christopher] Allen did not relate her psychological disability to just her shoulder. . . .

. . . .

Dr. Allen attributes her problems to all of her accident - - accidents which happened in May and October of 2003, and December of 2004. At no time does Dr. Allen ascribe her injuries to just the shoulder event. **The import of his opinion is that her condition related to a combination of all three (3) alleged injuries.** It is irrelevant as to which injury the ALJ has chose for compensability. The opinion of Dr. Allen was that the perception of the claimant was that she had multiple physical injuries which then "caused" her development of a psychological disability. Therefore the only relevant date for determining the application of the multiplier is the last date of her perceived injuries!

This is significant because her wage rate at the time of the December 16, 2004[,] injury was \$639.78. Following her return to work, and as of her last day of work, she was only earning \$622.00 per week. Therefore, she does not meet the requirement of KRS 342.730(1)(c)(2) because she never returned to work earning equal or greater wage.

Heaven Hill's Brief at 15-16.

We do not believe the Board erred in affirming the ALJ's application of the 2 multiplier found in KRS 342.730(1)(c)(2). Although Dr. Christopher

Allen attributed Lawson's psychological injury to her lumbar, cervical, and shoulder injuries, it was within the discretion of the ALJ as fact-finder to believe and disbelieve parts of Dr. Allen's testimony. Moreover, Lawson testified regarding the ongoing pain and discomfort directly related to her shoulder injury. Thus, the ALJ's finding that Lawson's psychological injury was caused by her shoulder injury was supported by substantial evidence. Therefore, the ALJ properly utilized the injury date of October 27, 2003, when determining Lawson's average weekly wage and properly determined that Lawson was entitled to the 2 multiplier of KRS 342.730(1)(c)(2).

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

ALL CONCUR.

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