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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000024-WC

ALLIED SYSTEMS, LTD. APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-08-83906

ERNEST BRADLEY; HON. RICHARD JOINER, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

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

PER CURIAM: Allied Systems, Ltd., (Allied) petitions this Court to review an opinion of the Workers' Compensation Board (Board) entered December 4, 2009, affirming a decision of the Administrative Law Judge (ALJ) to award Ernest

Bradley workers' compensation benefits based upon a 40.5 percent permanent disability rating. We affirm.

Bradley filed a claim for workers' compensation benefits for an alleged work-related knee injury. Bradley was employed by Allied as a truck driver and injured his knee while inspecting his truck. Allied contested that the injury was work related and argued that degenerative changes were the cause. Allied also disputed the degree of disability suffered by Bradley. Eventually, the ALJ found that Bradley's knee injury was work related and assessed a 40.5 percent permanent disability rating. The ALJ also awarded Bradley benefits based upon the "two-multiplier" found in Kentucky Revised Statutes (KRS) 342.730(1)(c)(2). Being dissatisfied with the ALJ's award, Allied sought review with the Board. The Board affirmed the ALJ's award, thus precipitating our review.

Allied raises two issues for our consideration:

> A. Whether the Administrative Law Judge relied upon an impairment rating that was not properly calculated under the 5th Edition of the *AMA Guidelines*.
>
> B. Whether the Administrative Law Judge incorrectly applied the two[-]multiplier to Mr. Bradley's benefits.

Allied's Brief at 4.

As an appellate court, we will only disturb the Board's opinion when it has overlook or misconstrued the law or flagrantly erred in evaluating evidence so as to cause gross injustice. *W. Baptist Hospital v. Kelly*, 827 S.W.2d 685 (Ky.

1992). To do so, we necessarily review the ALJ's opinion. *Abbott Laboratories v. Smith*, 205 S.W.3d 249 (Ky. App. 2006). As fact-finder, it is within the sole province of the ALJ to weigh the credibility and determine the substance of the evidence. *Id.*

Both of Allied's contentions of error were raised before the Board, and the Board conducted a thorough review of the evidence and law in its opinion rejecting same. After considering the Board's opinion, the ALJ's opinion and the arguments of both parties, we concluded that the Board committed no error, and we adopt its erudite reasoning herein:

> We similarly find no merit with regard to Allied's argument that the 30% whole person impairment assessed by Dr. Frederic Huffnagle and adopted by the ALJ, was in error because it failed to comport with the methodology established under the AMA *Guides* for assessing such ratings. Dr. Huffnagle, in his written report of March 9, 2009, plainly stated he arrived at the 30% impairment rating relative to Bradley's right knee injury by utilizing Table 17-35 located on page 549 of the 5th Edition of the AMA *Guides*. In fact, a copy of Table 17-35 is attached as an exhibit to Dr. Huffnagle's report.
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> In *Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206 (Ky. 2003), the Kentucky Supreme Court instructed that the proper interpretation of the AMA *Guides* is a medical question solely within the province of the medical experts. Consequently, while an ALJ may elect to consult the AMA *Guides* in assessing the weight and credibility to be accorded an expert's impairment assessment, as the trier of fact the ALJ is never required to do so.
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> In this instance, Dr. Nemeth did not address the issue of Bradley's entitlement to an impairment rating

under the AMA *Guides*, nor did he comment on the methodology utilized by Dr. Huffnagle under the AMA *Guides*. Though Dr. Waggoner assessed a different impairment rating than Dr. Huffnagle, he equally did not address the reason for the difference. In this instance, the only criticism concerning the alleged inaccuracy of the impairment rating assessed by Dr. Huffnagle is the independent review offered by Allied's lawyer, not a physician, in its brief to this Board. Our courts have consistently stated that the proper method for impeaching a physician's methodology under the AMA *Guides* is through cross-examination or the opinion of another medical expert. *Brasch-Berry General Contractors v. Jones*, 189 S.W.3d 149 (Ky. App. 2006). That did not occur in this case. Thus, we again find no error.

Finally, we disagree with Allied that under the facts as determined, the ALJ erred by awarding the 2-multiplier. Contrary to Allied's characterization of *Ball v. Big Elk Creek Coal Co. Inc.*, 25 S.W.3d 115 (Ky. 2000), we interpret the Kentucky Supreme Court's holding in that case as merely standing for the proposition that for purposes of KRS 342.730(1)(c)2, an employee's post-injury earnings are subject to calculation under KRS 342.140(1) in the same manner as the calculation of his pre-injury wages. In such instances, therefore, the question to be addressed both pre- and post-injury is the claimant's AWW [average weekly wage] at both points in time. Just as a claimant who is injured on his first day of work is entitled to an award of benefits under the Act utilizing an estimated average weekly wage, we believe under the court's holding in *Ball*, *supra*, an injured worker who continues to work post-injury, regardless of the duration, is entitled to the same accommodation with respect to a determination of post-injury earning capacity and AWW under KRS 342.140(1). Thus, contrary to Allied's contentions, it was not necessary for Bradley to have worked a full thirteen weeks post-injury in order to be eligible to receive an award of double benefits under the Act. Rather, we believe an award enhanced by the 2-multiplier may be deemed appropriate: 1) so long as a claimant continues to work post-injury for a period of time; 2) the claimant

> subsequently ceases work due to the disabling effects of his injury; 3) a post-injury AWW can be determined, inferred or projected by the ALJ from the evidence using one of the statutorily established methods laid down under KRS 342.140(1); and, 4) the post-injury AWW as determined by the ALJ is equal to or greater than the claimant's AWW at the time of the injury.
>
> As noted above, it is undisputed that following the injury of June 1, 2008, Bradley continued to work for Allied through June 6, 2008. It is further undisputed that Bradley ceased working at that time due to the disabling effects of his injury. Based on Bradley's testimony, we believe the ALJ could reasonably infer from the record that Bradley continued to earn equal wages as at the time of the injury for that period. Moreover, we believe the ALJ could further reasonably infer from the record that Bradley's post[-]injury wage, based on the number of days worked after June 1, 2006, and the likelihood he will eventually physically be able to resume that type of work, would be his usual wage for similar services had he worked and been employed by Allied for a full thirteen calendar weeks following the injury. KRS 342.140(1)(e); *Ball vs. Big Elk Creek Coal Co. Inc., supra*. Because the ALJ determined Bradley's work-related injury of June 1, 2008[,] resulted in a permanent partial disability, Bradley returned to work for a time following that traumatic event at same or greater wage, Bradley eventually will physically be able to so again, and Bradley's employment with Allied ceased post-injury on June 6, 2008[,] due to the effects of his "disabling work-related injury," we believe the ALJ also properly determined Bradley was entitled to double weekly benefits under KRS 342.730(1)(c)2. *Chrysalis House, Inc. v. Tackett*, 283 S.W.3d 671 (Ky. 2009).

Accordingly, we hold that the Board properly affirmed the ALJ's award.

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

ALL CONCUR.

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