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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002387-WC

JESSIKA MOORE — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-64413

PIZZA HUT, INC.; WORKERS' COMPENSATION BOARD; AND HON. HOWARD E. FRAZIER, ADMINISTRATIVE LAW JUDGE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND NICKELL, JUDGES.

CAPERTON, JUDGE: The Appellant, Jessika Moore, appeals the November 24, 2009, opinion and order of the Workers' Compensation Board affirming the June 16, 2009, decision of the Administrative Law Judge (ALJ) regarding determination

of Moore's average weekly wage, and the proper calculation of permanent partial disability (PPD) benefits pursuant to the Workers' Compensation Act in effect in 1999. Having reviewed the record, the arguments of the parties, and the applicable law, we affirm.

Moore alleged that on July 15, 1999, while employed with Pizza Hut, Inc., she sustained injury to her right wrist[1] while pulling a pizza out of the oven. Following the injury, Moore underwent medical treatment, and was released to return to work immediately with restrictions as to the use of her right hand. Moore continued working at Pizza Hut through August 19, 1999. Thereafter, she received temporary total disability (TTD) benefits from the employer in the amount of $97.44 per week from August 20, 1999, through March 3, 2002, at which time the benefits were terminated.

Moore testified below that when initially hired at Pizza Hut in March of 1999, her duties consisted of taking orders for pizza, entering orders into the computer, and running the cash register. Moore stated that she was not hired as a waitress, but would occasionally wait tables when the restaurant was short-staffed. Approximately one month later, Moore's manager requested that she help him "clean up" another Pizza Hut located in Lexington that was not doing well.

Moore testified that the manager asked if she would be interested in becoming the "buffet manager" at that store. Moore stated that she accepted the

[1] Moore alleges that this initial injury developed into a number of others, including numbness in the left hand (due to overuse in an attempt to compensate for lack of use on the right), depression, anxiety, and other disabilities.

position, and began training for it approximately a month prior to her work injury on July 15, 1999. According to Moore, she expected to earn $8.00 per hour in that position, for forty hours per week, in addition to the opportunity for overtime. At the time of the injury, Moore was earning $6.00 per hour. She assumed her training would last an additional month. Moore explained that as a buffet manager, she would at times stay past her normal shift time in order to continue preparation for the next day, and might also be called to fill in on weekends.[2]

Concerning tips, Moore testified that prior to the work injury, her tips averaged between $150 and $200 per week. Moore acknowledged that she did not report her tips on her income tax return.[3] She acknowledged that after becoming the buffet manager, she did not wait tables as much as she had previously, but still had to help wait tables when needed. Moore estimated that as the buffet manager, she earned at least $10.00 per day in tips.[4]

As noted, Moore eventually left Pizza Hut on August 19, 1999, because her condition worsened and she was unable to work. Until the time that

[2] With regard to how many hours of overtime Moore would typically work, we note that the employer filed into evidence Moore's wage records from Pizza Hut showing her hours and wages prior to the injury for the time period from March 3, 1999, to June 21, 1999. Those records show that Moore was paid every two weeks, and for her first two-week pay period ending on March 17, 1999, earned an average of 16.56 hours per week. However Moore notes that for the two-week pay period ending July 21, 1999, she worked 96.74 hours. Moore argues that the majority of those hours were worked prior to the injury, because after the injury she worked less due to pain. Accordingly, she argues that she would not only be likely to work overtime in the future, but also that the amount of this overtime would be greater than eight hours per week.

[3] Moore testified that she did not report the tips because she was hired to answer the phone and put in orders, not wait tables, and because the manager never instructed her to record her tips.

[4] Thus, Moore argues that with the addition of $64.00 for overtime and $50.00 in tips, in addition to her regular weekly pay of $320.00, her average weekly wage should have been calculated to be at least $434.00.

Moore left Pizza Hut, she was earning the same or greater wages as at the time of the injury. The parties stipulated that she did not have the physical capacity to return to the type of work she was performing at the time of the injury. Thereafter, Moore accepted a position at Waverly's as a sales clerk in July of 2002. She has held various jobs since that time, and at the time of filing her brief in this matter, was employed at H & H Lexington, LLC, doing inventory control.

Following the initial litigation of Moore's claim, a decision was entered by ALJ Frasier, who found a permanent partial impairment of 47%. He also found that Moore was physically unable to return to the type of work she was performing at the time of the injury. Applying Kentucky Revised Statutes (KRS) 342.730, the ALJ found that the impairment rating assigned would be multiplied by a 2.5 grid factor, and that the finding of an inability to return to her regular work duties required the application of an additional 1.5 multiplier. Further, the ALJ found that because the permanent partial disability exceeded 50%, Moore was entitled to a 520-week award.

In addition to the aforementioned findings, the ALJ determined that, pursuant to KRS 342.730(1)(d), benefits payable for permanent partial disability should not exceed 99% of 66 and 2/3 of Moore's average weekly wage, and that further, KRS 342.730(1)(c)(2) provided that if an employee returned to work at a weekly wage equal to or greater than the average weekly wage, then the amount payable would be reduced by one-half.

The ALJ determined Moore's average weekly wage to be $320.00, based upon her participation and prospective completion of a management training program.[5] The ALJ rejected Moore's allegation of lost tip and overtime income, deeming her testimony in that regard to be too speculative. The ALJ calculated the PPD benefit that Moore would receive as follows: $320.00 x 66 2/3% x 47% x 2.5 x 1.5 = $375.99. The ALJ then reduced the benefit to $365.40, stating that same was the maximum PPD rate for a 1999 injury. As noted, the ALJ ordered the benefit to run for 520 weeks, excluding the weeks that Moore was being paid TTD. He also reduced the $365.40 PPD benefit by 50% to $182.70 for the 13-week post-injury quarters that Moore was making the same or greater wages.

Petitions for reconsideration were thereafter filed, in which the employer argued that the language of KRS 342.730(1)(d) limited the PPD benefit to 99% of 66-2/3% of Moore's average weekly wage, as opposed to the finding of the ALJ that the average weekly wage should be $365.40. Accordingly, the employer also argued that the benefits for the 13-week quarter that Moore returned to work at equal or greater wages should have been $105.60, as opposed to $182.70. Moore also filed a petition for reconsideration, arguing that the PPD figures should have been $375.99 and $188.[6] Those petitions were ruled upon by

[5] Upon completion of that program, Moore was expected to earn $8.00 an hour for a 40-hour work week. That amount was not inclusive of any tips or overtime Moore might have earned, as discussed herein, *infra*.

[6] In making that assertion, Moore made the same arguments she now makes to this Court, which are discussed in detail, *infra*.

the ALJ, who found that Moore was entitled to a TTD rate of $213.35,[7] a PPD maximum of $211.21,[8] and entitlement to one-half of the PPD rate, or $105.60, upon returning to work earning the same or greater income.

Moore appealed the findings of the ALJ to the Board, which upheld the ALJ. This appeal followed. At the outset, we note that our Kentucky Supreme Court has long recognized that the function of the Court of Appeals in reviewing the decisions of the Board is to correct the Board only where the Court perceives 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. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). We review the arguments of the parties with this standard in mind.

As her first basis of appeal, Moore argues that the ALJ and the Board misconstrued KRS 342.730(1)(d) and existing precedent in limiting the PPD benefit in this claim to 99% of 66 2/3% of Moore's average weekly wage. In support of that argument, Moore asserts that KRS 342.730(1)(c)(1) applies to her claim. Moore argues that in such claims, KRS 342.730(1)(d) provides that the benefit shall not exceed 100% of the state average weekly wage which, for a 1999 injury, was $487.20.

In addressing this issue, we note that at the time of Moore's injury, KRS 342.730(1)(c)(1) and (2) provided as follows:

[7] Representing two-thirds of her average weekly wage.

[8] 99% of the TTD rate (or 99% of Moore's average weekly wage) pursuant to KRS 342.730(1)(d).

> (1)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 one and one-half (1-1/2) 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.
>
> (2) 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 otherwise payable under paragraph (b) of this subsection shall be reduced by one-half (1/2) for each week during which 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 restored to the rate prescribed in paragraph (b) of this subsection.

Further, KRS 342.730(1)(d) read, in pertinent part, as follows:

> Benefits payable for permanent partial disability shall not exceed ninety-nine percent (99%) of sixty-six and two thirds percent (66-2/3%) of the employee's average weekly wage as determined under KRS 342.740 and shall not exceed seventy-five percent (75%) of the state average weekly wage, except for benefits payable pursuant to paragraph (c)1 of this subsection, which shall not exceed one hundred percent (100%) of the state average weekly wage . . . .

Moore takes particular issue with the "except" clause in the latter portion of KRS 342.730(1)(d), and isolates the issue before this Court as whether that language overrides both of the preceding limiting phrases, or just the second limiting phrase. In other words, Moore argues that because she did not retain the physical ability to return to the duties of her regular employment, her benefits should not have been limited to 99% of 66-2/3% of her average weekly wage, but

instead, should have remained at the $375.99[9] figure originally calculated by the ALJ, because that number did not exceed 100% of the state average weekly wage at the time.

In granting the employer's petition for reconsideration on calculation of benefits, the ALJ relied upon the holding of our Kentucky Supreme Court in *Stewart v. Kiah Creek Mining*, 42 S.W.3d 614 (Ky. 2001). In that case, the Supreme Court set out the method for calculating the workers' compensation award for a partially disabled worker who is unable to return to the type of work he performed when injured.

Moore attempts to distinguish *Kiah* by noting that the claimant was a high wage earner, who made more than the state maximum average weekly wage. She also states that the claimant in *Kiah* had a relatively low impairment rating of 15%, which, when multiplied by the applicable grid factor, amounted to 18.75%, as opposed to Moore's significantly higher rating. Finally, she notes that the claimant in *Kiah* did not return to work making equal or greater wages, which Moore did, and, accordingly, the Court did not reach the issue of whether the "except" clause applied to the PPD benefit before or after it was reduced by 50%. Moore also makes a number of arguments about the grammatical style in which the statute is written, and argues that *Kiah* misconstrued the language of the statute in finding as it did. She also argues that the *Kiah* Court was primarily concerned that

[9] As noted, the ALJ initially calculated the PPD benefit that Moore would receive as follows: $320.00 x 66 2/3% x 47% x 2.5 x 1.5 = $375.99.

a partially disabled claimant not receive more than a totally disabled claimant, and that such is not the case in her claim.

In *Kiah*, our Supreme Court held as follows:

> We find nothing in the plain language of KRS 342.730(1)(d) that is unclear, and therefore, subject to interpretation. It contains three separate provisions, all of which affect partial disability awards. First, it sets the duration of the awards: 425 weeks for a disability rating of 50% or less and 520 weeks for a disability rating of more than 50%. Second, it limits the maximum benefit for partial disability to 99% of 66-2/3% of the worker's average weekly wage unless KRS 342.730(1)(c)(1) applies, in which case the benefit is limited to 100% of the state's average weekly wage. Third, it limits the maximum duration of partial disability benefits to 520 weeks even if the disability rating which is calculated in KRS 342.730(1)(b) yields a percentage that is greater than partial.

Kiah at 617. Accordingly, the *Kiah* Court explained very clearly that the proper method for calculating the award of a partially disabled worker who is unable to return to the type of work performed at the time of injury is as follows:

1. Calculate the benefit for partial disability as directed by KRS 342.730(1)(b):

   (a) Calculate the permanent disability rating by multiplying the AMA impairment by the applicable factor from the table in KRS 342.730(1)(b).

   (b) Multiply the disability rating by 66-2/3% of the worker's average weekly wage or 75% of the state's average weekly wage, whichever is less.

2. Multiply the benefit for partial disability by 1.5 as directed by KRS 342.730(1)(c)(1).

3. Apply KRS 342.730(1)(d):

(a) Determine the duration of the benefit based upon the permanent disability rating obtained in step 1a.

(b) Limit the benefit to a maximum of 99% of 66-2/3% of the worker's average weekly wage and 100% of the state's average weekly wage because KRS 342.730(1)(c)(1) applies.

(c) The duration of the benefit may not exceed 520 weeks even if the permanent disability rating equals or exceeds 100%.

Kiah at 618.

In reviewing the holding of *Kiah*, we are in agreement with the Board that the Supreme Court was very clear as to how it believed benefits should be calculated in instances where a partially disabled claimant is unable to return to the type of work he or she performed at the time of injury. Were we to accept Moore's arguments in this instance, her PPD benefit would exceed her actual average weekly wage. To hold accordingly, would certainly be contrary to the intent of KRS 342.730.

In deciding as it did in *Kiah*, the Supreme Court had the very statute before it that Moore now argues should have been interpreted differently. We are bound to follow precedent and, accordingly, decline to reverse for reasons of differing grammatical interpretation, or because Moore's wage, disability level, and ultimate benefit rate was different than that of the claimant in *Kiah*. Stated simply, we are in agreement with the Board that the language of KRS

342.730(1)(d) must be read such that in cases where KRS 342.730(1)(c)(1) is applicable, the maximum PPD benefit is the lesser of 99% of 66-2/3% of the worker's average weekly wage, or 100% of the state's average weekly wage. That is how Moore's benefits were calculated in the matter *sub judice*. Accordingly, we affirm the Board on this issue.

As her second basis of appeal, Moore argues that the ALJ and Board misconstrued KRS 342.730 by awarding a reduced benefit of $105.61 instead of $188.00 for the weeks that Moore made equal or greater wages. In making this assertion, Moore alleges that the ALJ failed to apply the provisions of KRS 342.730 in sequential order, and asserts that instead of calculating the benefits as he did, he should have done as follows:

> After applying paragraph KRS 342.730(1)(c)(1) and arriving at $375.99, he should have then applied the next paragraph, KRS 342.730(1)(c)(2), which would have lowered the PPD benefit by 50% to $188.00 for those weeks Appellant was making at or better wages. Only after making this reduction should the ALJ have then proceeded to the next paragraph, KRS 342.730(1)(d), to apply the limiting language contained therein.... [T]he Appellant should have been awarded $188.00, instead of $105.61, for all weeks when she is due a 50% reduction in her PPD benefit for making at or better wages. The limiting language of KRS 342.730(1)(d) never comes into play for those weeks that Appellant was making at or better wages.

Appellant's Brief, p. 12.

We believe this argument fails for the same reasons as the first. Clearly, KRS 342.730(1)(c)(2) provides that:

> "If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of the disability 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.

As the Board held, the correct permanent partial disability figure in this matter was $211.21. Half of that amount is $105.61. Were we to accept Moore's arguments, her benefits during periods in which she returned to work at equal or greater wages would only be reduced by $22.21, rather than by the 50% mandated by the statute. We think it is clear that the sum which is to be reduced by one-half pursuant to KRS 342.730(1)(c)(2) must first be determined subject to the limitations contained in KRS 342.730(1)(d). We find no valid authority to support an argument to the contrary. Accordingly, we again affirm the Board.

As her third basis for appeal, Moore argues that the ALJ erred in finding that Moore had not sustained her burden of proof concerning tip and overtime income. With respect to overtime, Moore argues that the evidence established that in the week prior to the work injury, she had a significant amount of overtime, and that these numbers would be the best gauge of the amount of overtime she would have been working in the future. She argues that there was no evidence that she would not be expected to work some overtime in the future and

that, accordingly, the court erred in not calculating an average weekly wage which included anticipated overtime.

With respect to her tips, Moore notes that below she estimated that as a buffet manager, she would make at least $10.00 per day in tips, and approximately $50.00 per week. Although Moore acknowledges the requirement of KRS 342.140(6) regarding the reporting of tips, she argues that the statute addresses the determination of average weekly wage based on past actual wages. Thus, Moore argues that because the issue she raises in this case concerns what she is expected to make in the future, whether or not she reported wages in the past was irrelevant. Accordingly, Moore asserted that in total the ALJ should have calculated her average weekly wage at $434.00, to include her regular wages of $320.00, $64.00 for anticipated overtime, and $50.00 in expected tips.

In addressing this issue, the ALJ found that Moore had given credible testimony at the hearing that following her training period, she would likely earn $8.00 per hour for a 40-hour work week. However, with respect to tips and overtime, the ALJ found that "Her testimony about overtime and what tips she would receive was simply too speculative to be found credible over and above the less speculative testimony of training for a full-time position of forty hours per week." The ALJ further noted his awareness of his discretion to reject unrebutted testimony if such testimony is too speculative to be given effect.

The Board affirmed the ALJ, finding that it was within the discretion of the ALJ to believe and disbelieve various parts of the evidence, even from the

same witness, and that the evidence did not compel a finding to the contrary. Because we are in agreement with the Board we, too, decline to overturn the ALJ on this issue.

As we have previously noted herein, our review of an ALJ's decision is limited, and we are without authority to substitute our judgment for that of the ALJ as to the weight of the evidence on questions of fact. *See* KRS 342.285, and *Square D. Company v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). Indeed, the law is clear that the ALJ has the authority to reject any testimony, and to believe or disbelieve various parts of the evidence. *See Magic Coal Co. v. Fox*, 19 S.W.3d 88 (Ky. 2000). Thus, we agree with the Board that the ALJ was within his authority to accept certain portions of Moore's testimony concerning her expected hourly wage as a buffet manager, and to reject her testimony concerning overtime and tips. Where a claimant fails to convince the ALJ and the Board that his or her burden of proof was met, the claimant must demonstrate on appeal that the evidence was so compelling as to nesessitate a finding in her favor. *See Special Fund v. Frances*, 708 S.W.2d 641 (Ky. 1986). We do not find that such was the case in this instance.

Wherefore, for the foregoing reasons, we hereby affirm the November 24, 2009, opinion and order of the Workers' Compensation Board affirming the June 16, 2009, decision of the Administrative Law Judge.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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