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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001470-WC

WAL-MART STORES, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-10-00838

KHALID MANDEEL; HON. RICHARD JOINER,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

AND

NO. 2011-CA-001617-WC

KHALID MANDEEL

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-10-00838

WAL-MART STORES, INC.; HON. RICHARD JOINER,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** * * * * *

BEFORE: COMBS, KELLER AND STUMBO, JUDGES.

STUMBO, JUDGE: Wal-Mart Stores, Inc. appeals from the opinion of the Workers' Compensation Board (Board) entered July 15, 2011, which affirmed the opinion of the Administrative Law Judge (ALJ) on the issue of temporary total disability (TTD) benefits awarded to Khalid Mandeel and vacated and remanded on the issue of a credit Wal-Mart should receive regarding overlapping unemployment benefits. The Board found that the ALJ erred when Wal-Mart was not given any credit for unemployment benefits paid to Mandeel. The Board found that Wal-Mart should have been given credit for the unemployment payments made to Mandeel from October 17, 2009, through April 10, 2010. Wal-Mart now appeals arguing that Mandeel should not have been awarded any TTD benefits and that it should have received a credit for unemployment benefits paid through August 8, 2010. Mandeel cross-appeals arguing that Wal-Mart is not entitled to any credit for unemployment benefits he received. We find that Mandeel was correctly awarded TTD benefits, but that Wal-Mart should have received a credit for unemployment benefits through August 8, 2010. We therefore reverse and remand on the issue of the amount of credit to which Wal-Mart is entitled.

Mr. Mandeel was employed by a Wal-Mart in Louisville as an assistant manager. His position required him to perform various acts of physical labor, including cleaning bathrooms, unloading trucks, stocking shelves, lifting furniture, and helping customers load their vehicles. It also required him to fill out paperwork. Mandeel testified that his job consisted of 75% physical work and 25% paperwork. On October 15, 2008, he fell and injured his head and left shoulder. He was knocked unconscious and woke up in the hospital. When he woke up, he did not recognize members of his family and could not speak any English. Two days later he recognized his family, but could not speak English for over six months.

Dr. Edward Sames began treating Mandeel for his injuries immediately after the accident. Dr. Sames gave Mandeel a 0% impairment rating and said there were no restrictions in regards to his work for Wal-Mart.

Dr. Sames referred Mandeel to Dr. Joseph Catalano for an orthopedic consultation. Dr. Catalano ultimately performed arthroscopic surgery on Mandeel's left shoulder on February 8, 2010. Currently, his shoulder continues to hurt. Dr. Catalano filed multiple reports regarding Mandeel's physical impairment. Eventually, Dr. Catalano filed a report on December 14, 2010, stating that Mandeel had reached maximum medical improvement (MMI) on August 8, 2010. Dr. Catalano also gave Mandeel a 5% total body impairment rating. Mandeel was also restricted to a maximum of lifting 50 pounds to the waist, 20 pounds to the shoulders, and 10 pounds overhead.

Dr. Ellen Ballard also evaluated Mandeel for an independent medical examination. Her report is dated August 16, 2010. She took a history, reviewed medical records, and performed a physical examination. She gave Mandeel a 10% total body impairment rating. She also recommended he not lift more than 20 pounds with his left arm from waist to shoulder and no overhead work.

Mandeel could not return to Wal-Mart due to his shoulder pain. He looked for other work, but began drawing unemployment benefits October 17, 2009.

In the ALJ's opinion, he found that Mandeel was entitled to TTD benefits based on Mandeel's testimony that he was unable to return to his work at Wal-Mart. The ALJ also discussed the findings of Drs. Catalano and Ballard. The ALJ awarded these benefits from October 15, 2008, the date of the injury, until August 8, 2010, the date Mandeel reached MMI. The ALJ also found that Wal-Mart was not entitled to any credit for the unemployment benefits Mandeel received because no unemployment records were introduced into evidence. The ALJ made other findings, but they are not relevant for our purposes.

Wal-Mart then appealed to the Board. The Board found that there was substantial evidence to support the award of TTD benefits. The Board discussed the MMI findings and the work restrictions placed on Mandeel by Drs. Catalano and Ballard. The Board also noted Mandeel's own testimony that he could not perform the same type of work he was performing at the time of his injury.

The Board also found that the ALJ erred when it did not award Wal-Mart a credit for unemployment benefits Mandeel received. The Board found that Wal-Mart had filed unemployment records with the ALJ. The records indicated that Mandeel received \$415.00 per week from October 17, 2009, through April 10, 2010. The Board also found that Mandeel testified that he received \$830.00 or \$840.00 every two weeks before taxes and \$748.00 after taxes. After the final hearing, Wal-Mart requested time to file additional unemployment records, ostensibly for the time period after April 10, 2010. Wal-Mart did not file any further unemployment documents. The Board held that Wal-Mart was entitled to a credit for unemployment benefits Mandeel received from October 17, 2009, to April 10, 2010. Since Wal-Mart did not file the additional records, the Board refused to give any further credit. This appeal and cross-appeal followed.

“The function of further review of the WCB in the Court of Appeals is to correct the Board only where the Court perceives 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 Hosp. v. Kelly*, 827 S.W.2d 685, 687-688 (Ky. 1992).

KRS 342.285 designates the ALJ as the finder of fact. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985), explains that the fact-finder has the sole authority to judge the weight, credibility, substance, and inferences to be drawn from the evidence. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986), explains that a finding that favors the party with the burden of proof may not be disturbed if it is supported by substantial evidence and, therefore, is reasonable.

AK Steel Corp. v. Adkins, 253 S.W.3d 59, 64 (Ky. 2008). “Substantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Smyzer v. B. F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971).

Wal-Mart’s first argument is that the Board erred when it affirmed the ALJ’s award of TTD benefits. Wal-Mart claims the ALJ’s finding that Mandeel was restricted from his customary work from December 15, 2008, through August 8, 2010, is not supported by substantial evidence. Wal-Mart argues that no doctor put restrictions on Mandeel and that he was able to return to his customary work soon after his release from the hospital.

Kentucky Revised Statute (KRS) 342.0011(11)(a) states that TTD means the condition of an employee who has not reached MMI from an injury and has not reached a level of improvement that would allow him to return to work. The work the employee must be able to return to has to be the type of work he was performing at the time of the injury. *Central Kentucky Steel v. Wise*, 19 S.W.3d 657, 659 (Ky. 2000). Once an employee either reaches MMI or is able to return to his customary work, TTD benefits cease.

We find the Board did not err on this issue. Mandeel himself testified that he was unable to return to his customary work because it involved a lot of physical activity, which his shoulder would not accommodate. “A worker’s testimony is competent evidence of his physical condition and of his ability to perform various

activities both before and after being injured.” *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000) (citing *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979)). In addition, both Dr. Catalano and Dr. Ballard put work restrictions on Mandeel. This is substantial evidence that shows Mandeel was unable to return to his previous position with Wal-Mart. It is also undisputed that Mandeel reached MMI on August 8, 2010. August 8 is therefore the cutoff date for TTD benefits.

It appears that Wal-Mart is focusing on the fact that the ALJ did not list the medical evidence in the section of his opinion labeled “Discussion and Findings.” Wal-Mart seems to be claiming that since there was no medical evidence listed in the “Findings” section, the ALJ did not find any medical evidence that Mandeel had work restrictions. This claim is without merit. The ALJ discussed all the medical evidence elsewhere in the opinion and even though it was not listed in the “Findings” section, it is obvious the ALJ relied upon it when making his findings.

Wal-Mart’s other issue on appeal is that the Board erred when it only allowed a credit for unemployment benefits up until April of 2010. Wal-Mart argues it should have been given credit for benefits paid until August 8, 2010, when Mandeel reached MMI. Mandeel cross-appeals arguing that the Board erred in not affirming the ALJ’s award of no credit for unemployment benefits.

KRS 342.730(5) states that “[a]ll income benefits pursuant to this chapter otherwise payable for temporary total and permanent total disability shall be offset by unemployment insurance benefits paid for unemployment during the period of temporary total or permanent total disability.” KRS 342.730(5) uses the

mandatory “shall” language. Wal-Mart is entitled to a credit if it can produce substantial evidence as to the amount and duration of unemployment benefits Mandeel received. Mandeel’s only argument is that the \$415.00 per week amount was not proven to be a before or after taxes amount;¹ therefore, Wal-Mart failed in its burden of proof.

We find that Wal-Mart was entitled to receive credit for unemployment benefits paid to Mandeel up until August 8, 2010. Wal-Mart filed records from the unemployment office showing Mandeel received benefits in the amount of \$415.00 every week from October 17, 2009, through April 10, 2010. This is supported by Mandeel’s testimony that he received \$830.00 or \$840.00 every two weeks before taxes until December 15, 2010. Mandeel also testified during his deposition and at the final hearing that he received \$748.00 after taxes. Mandeel never disputed these amounts and has consistently testified as to how much he received. Even in his written arguments to this Court, Mandeel does not dispute the amounts. We therefore reverse and remand this case to the Board for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-
APPELLEE WAL-MART STORES,
INC.:

Joel W. Aubrey
Andrew F. Manno

BRIEFS FOR APPELLEE/CROSS-
APPELLANT KHALID MANDEEL:

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¹ The unemployment benefit credit only applies to amounts received after taxes.

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