RENDERED: JANUARY 31, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000349-WC

ALTON LIVINGOOD APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-73444

TRANSFREIGHT, LLC;
HONORABLE ROBERT SWISHER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Alton Livingood petitions this court for review of an opinion of the Workers' Compensation Board ("Board") affirming an opinion of an Administrative Law Judge ("ALJ") which denied Livingood additional temporary

total disability ("TTD") benefits, and declined to apply an enhancement multiplier to his permanent partial disability ("PPD") benefits. For the following reasons, we affirm.

Livingood suffered a work injury to his left shoulder in September 2009 while working as a forklift operator for Transfreight, LLC ("Transfreight"). After the injury, Livingood was treated by Dr. Travis Hunt, who performed two surgeries on Livingood's shoulder. Livingood was off work and received TTD benefits from November 2009 until March 2010, when he returned to work on modified duty at the same wage he was previously paid. Livingood continued working until he underwent a third surgery, performed by Dr. Scott Mair, in October 2010.

Livingood received TTD benefits again from October 2010 through December 2010, returning to work without restrictions on December 13, 2010. On that same day, Livingood backed the forklift he was operating into a pole. Livingood continued to work as a forklift operator until he was terminated on December 23, 2010, due to the December 13, 2010 incident. Dr. Terry L. Troutt performed an independent medical evaluation on Livingood, and a final benefit hearing was held in June 2012. The ALJ determined that Livingood's injury resulted in a 5% whole person impairment rating, without any multipliers, and that Livingood was not entitled to an additional period of TTD benefits while he returned to work from March 2010 through October 2010.

Livingood appealed the ALJ's decision, which the Board affirmed. Before this court, Livingood raises three claims of error. First, Livingood argues that he is

entitled to TTD benefits for the period he returned to work following his injury due to the fact that he was assigned to light duty work during that time. Second, Livingood asserts that the ALJ improperly independently interpreted the AMA Guides in assigning his impairment rating. Finally, Livingood argues that the ALJ erred in not enhancing his benefits by the two multiplier found in KRS[1] 342.730(1)(c)(2).

The well-established standard of review for the appellate courts of a workers' compensation decision "is to correct the [Workers' Compensation] 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." *E.g., W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992); *Butler's Fleet Serv. v. Martin*, 173 S.W.3d 628, 631 (Ky. App. 2005); *Wal-Mart v. Southers*, 152 S.W.3d 242, 245 (Ky. App. 2004). *See also Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986) (if the fact-finder finds in favor of the person having the burden of proof, the burden on appeal is only to show that some substantial evidence supported the decision); *cf. Gray v. Trimmaster*, 173 S.W.3d 236, 241 (Ky. 2005) (if the ALJ finds against the party having the burden of proof, the appellant must "show that the ALJ misapplied the law or that the evidence in her favor was so overwhelming that it compelled a favorable finding.")

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[1] Kentucky Revised Statutes.

Livingood first argues that during the period he returned to work following his injury, March 2010 through October 2010, he performed light duty work rather than his customary work, and is therefore entitled to additional TTD benefits for that period. We disagree. Pursuant to KRS 342.0011(11)(a), in order for a claimant to be entitled to TTD benefits, he must satisfy a two-prong test: (1) he must not have reached maximum medical improvement ("MMI"); and (2) he must not have reached a level of improvement that would permit his return to employment. *Double L Constr., Inc. v. Mitchell*, 182 S.W.3d 509, 513 (Ky. 2005). A release to perform minimal work rather than the type that is customary or that the employee was performing at the time of the injury does not constitute "a level of improvement that would permit a return to employment" under KRS 342.0011(11)(a). *Id*. at 514 (citing *Cent. Kentucky Steel v. Wise*, 19 S.W.3d 657, 659 (Ky. 2000)). However, during his return to work, Livingood was paid the same wage he was paid prior to his injury. The ALJ found that a majority of Livingood's work during this time was work he had been trained to do, and work that he had previously performed for the employer. Once he returned to work, Livingood spent half of his time changing batteries in forklifts and 25% of his time ensuring freight was in the correct location, both tasks Livingood performed prior to his injury. In total, 75% of Livingood's post-injury work was work he customarily and regularly performed for his employer pre-injury. The ALJ found that Livingood had therefore not satisfied the second prong of the KRS

342.0011(11)(a) test for TTD benefits. We are not persuaded that the evidence in the record renders the ALJ's finding unreasonable or compels a different outcome.

Next, Livingood contends that the ALJ engaged in an improper, independent interpretation of the AMA Guides when assigning Livingood's impairment rating. We disagree. Livingood is correct in stating that interpretation of the Guides and the assessment of impairment are medical questions requiring medical testimony. *Lanter v. Kentucky State Police*, 171 S.W.3d 45, 52 (Ky. 2005). However, Livingood asserts that the ALJ independently assigned his 5% impairment rating without medical evidence. He alleges that the ALJ improperly carved out the 2% impairment rating assigned for pain from Dr. Hunt's overall 7% AMA impairment rating, which also included 5% impairment for loss of range of motion. Livingood claims this was a decision which amounted to an independent interpretation of the AMA Guides. Yet, the evidence shows that the ALJ assigned the impairment rating based on the testimony of Dr. Troutt, who opined that Dr. Hunt's assessment of a 2% impairment rating for pain was improper due to the fact that Livingood was only taking over the counter medication for his pain. The ALJ considered the opinions of Drs. Hunt and Troutt concurrently, concluding that while Dr. Hunt's 5% range of motion loss impairment rating was proper, Dr. Troutt's opinion as to Livingood's pain rating was proper. The determination of the witnesses' credibility and the weight to be given the evidence lies within the province of the fact-finder. *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 118 (Ky.

1991). We do not find the ALJ's conclusion to be an independent interpretation of the Guides, or an unreasonable conclusion in light of the evidence.

Finally, we do not agree with Livingood's assertion that his benefits should be enhanced by the two multiplier per KRS 342.730(1)(c)(2). KRS 342.730(1)(c)(2) states:

> 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 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.

While it appears that this statute provides for a doubled benefit anytime a cessation of employment at the same or greater wage occurs, the Kentucky Supreme Court has held that KRS 342.730(1)(c)(2) only permits a double income benefit when employment ceases for a reason relating to the disabling injury. *Chrysalis House, Inc. v. Tackett,* 283 S.W.3d 671, 674 (Ky. 2009). Livingood was ultimately let go due to the December 13, 2010 forklift incident. He claims this incident actually was a result of his injury, since he was unfamiliar with the area due to having been off work for a year and since he was under the influence of Lortab when it occurred. However, Livingood had been cleared by all of his treating physicians to return to work without restrictions and had returned to his full duties.

Transfreight's human resources representative testified that but for multiple prior infractions, the forklift incident would not have resulted in Livingood's termination. The ALJ ultimately decided that the termination was unrelated to Livingood's injury. This decision was within the ALJ's discretion and was not unreasonable in light of the evidence presented.

In conclusion, Livingood has not convinced this Court that any law has been misapplied or that any evidence has been flagrantly misinterpreted. Therefore, the Board's affirmation of the ALJ's decision was proper.

The Workers' Compensation Board's decision is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Larry D. Ashlock
Elizabethtown, Kentucky

BRIEF FOR APPELLEE:

Walter A. Ward
Donald J. Neihaus
Lexington, Kentucky