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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000366-WC

BLUEGRASS OAKWOOD — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-10-70120

MARY DENNEY; HONORABLE JOHN B. COLEMAN, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: Bluegrass Oakwood appeals from a decision of the Workers' Compensation Board affirming an award of partial permanent disability (PDD) in which the two times multiplier was awarded.

Mary Denney worked as a senior resident aide for Bluegrass Oakwood, a residential facility. The parties stipulated she received work-related

injuries on December 6, 2010 and May 20, 2011. The December 6, 2010, injury occurred when a patient became violent in the shower and Denney's right arm was injured resulting in pain to her right shoulder. She was treated conservatively for right shoulder strain and likely neck strain. An MRI scan on January 28, 2011, revealed a partial full thickness tear of the supraspinatus tendon, a split tear of the biceps tendon and degenerative changes to the glenohumeral joint with osteophytosis posteriorly. Denney received temporary total disability (TTD) benefits through March 14, 2011, and then returned to her normal work duties without restrictions. However, she had difficulty performing some of her duties due to residual weakness in her right shoulder and difficulty raising her right arm.

Her second injury occurred on May 20, 2011, while lifting large totes filled with clothing. An MRI of her shoulder on July 1, 2011, showed mild tendinopathy of the infraspinatus tendon, partial undersurface tearing of the supraspinatus and infraspinatus tendon and mild tendinosis of the biceps tendon. She had shoulder surgery for a torn rotator cuff in October 2011, which consisted of rotator cuff debridement, biceps debridement, subacromial decompression and distal clavical coplaning. On January 31, 2012, Denney was released to return to full duty without restrictions effective, December 6, 2011. However, she did not return to work because she was laid off in June 2011. She received TTD benefits from May 22, 2011 through January 3, 2012.

The Administrative Law Judge (ALJ) determined Denney had a 7% impairment for a PPD of 5.95% beginning December 7, 2010. He then considered

whether a multiplier from KRS 342.730(1)(c) applied and determined Denney was entitled to the two times multiplier in KRS 342.730(1)(c)2, because she returned to work earning the same or greater wages but then ceased to do so due to her injury.

Bluegrass Oakwood and Denney filed petitions for reconsideration. Bluegrass Oakwood alleged the ALJ erred in determining the date of the assignment of impairment was the date of the first injury and in applying the two times multiplier. Bluegrass Oakwood argued the reason for Denney's cessation of employment was solely due to a completely new injury on May 20, 2011, not due to any prior injury and because Denney failed to return to work after this new injury, it did not qualify for the multiplier. Denney claimed she was entitled to the three times multiplier because she did not have the physical capacity to return to the same type of work.

The ALJ denied both petitions for reconsideration. Bluegrass Oakwood appealed, arguing the ALJ erred as a matter of law in applying the two times multiplier. The Board affirmed,[1] explaining as follows:

> [W]e believe the only logical conclusion to be drawn is the ALJ determined the event occurring on May 20, 2011, was merely an aggravation or exacerbation of the December 6, 2010, work injury. Thus, enhancement by the two multiplier was justified since the reason for the cessation of Denney's employment at the same or greater wages related to the disabling work injury of December 6, 2010.

[1] The Board vacated for the ALJ to award PPD starting on December 6, 2010, rather than on December 7, 2010.

Pursuant to KRS 342.285, the ALJ as the fact-finder has the "sole discretion to determine the quality, character, and substance of evidence." *James T. English Trucking v. Beeler*, 375 S.W.3d 67, 69-70 (Ky. 2012). The ALJ may believe some evidence and disbelieve other evidence and adopt any reasonable inference from the evidence even if a contrary inference could also be made. *Carnes v. Parton Bros. Contracting, Inc*., 171 S.W.3d 60, 66 (Ky.App. 2005). Where a workers' compensation claimant is successful before the ALJ, the Board must affirm if there is substantial evidence to support the ALJ's conclusions. *Id.* at 68.

The Board or the appellate courts can correct an error in the ALJ's decision if the decision was erroneous as a matter of law. *James T. English Trucking*, 375 S.W.3d at 70. "Legal errors would include whether the ALJ misapplied Chapter 342 to the facts; made a clearly erroneous finding of fact; rendered an arbitrary or capricious decision; or committed an abuse of discretion." *Id*.

In reviewing the Board's decision, we only correct the Board if it overlooked or misconstrued controlling statutes or precedent, committed a flagrant error in assessing the evidence which caused gross injustice or substituted its judgment for that of the ALJ concerning factual findings. *AK Steel Corp. v. Childers*, 167 S.W.3d 672, 675 (Ky.App. 2005); *Carnes*, 171 S.W.3d at 66-67.

Bluegrass Oakwood argues the Board erred by making findings of fact and/or disregarding the stipulations of the parties in affirming the ALJ's award of the two times multiplier and the ALJ's award of the two times multiplier was incorrect as a matter of law. The ALJ considered both the three and two times

multipliers contained in KRS 342.730(1)(c) before determining Denney was entitled to the two times multiplier pursuant to subsection two. KRS 342.730(1)(c) provides:

> 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 multiplied by three (3) 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; or
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> 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 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.

Our Supreme Court examined the purpose and scope of KRS 342.730(1)(c)2 in *Chrysalis House, Inc. v. Tackett*, 283 S.W.3d 671, 674 (Ky. 2009) (footnotes omitted):

> KRS 342.730(1)(c)2 encourages a worker who retains the physical capacity to return to work at the same or a greater wage to do so. It permits the worker to receive the basic partial disability benefit in addition to the wage from working but assures the worker of a double benefit if the attempt later proves to be unsuccessful.

See also Toy v. Coca Cola Enterprises, 274 S.W.3d 433, 435 (Ky. 2008); *AK Steel Corp.*, 167 S.W.3d at 676.

The Court also clarified when the benefit was available for cessation of employment: "KRS 342.730(1)(c)2 permits a double income benefit during any period that employment at the same or a greater wage ceases 'for any reason, with or without cause,' provided that the reason relates to the disabling injury." *Chrysalis House*, 283 S.W.3d at 674. In *Hogston v. Bell S. Telecommunications*, 325 S.W.3d 314, 317 (Ky. 2010), the Supreme Court held "KRS 342.730(1)(c)2 includes a cessation of employment due to the disabling effects of previous work-related injuries as well as the injury being compensated."

Therefore, under KRS 342.730(1)(c)2 as interpreted by *Chrysalis House* and *Hogston*, a two times multiplier is appropriate if the record demonstrates the claimant: (1) sustained a work-related injury; (2) returned to work at a weekly wage equal to or greater than the average weekly wage at the time of the injury; and (3) thereafter ceased working for a reason related to the claimant's disabling injury or due to the disabling effects of previous work-related injuries.

Bluegrass Oakwood states the Board incorrectly assumed the ALJ found only one compensable injury occurred, on December 6, 2010, but the ALJ made no such finding and the parties stipulated to the occurrence of two separate injuries. Bluegrass Oakwood argues the Board rejected the parties' stipulation to two injuries and substituted its own finding of fact for that of the ALJ by assuming only

one compensable injury occurred which was later exacerbated, causing the cessation of employment and making the two times multiplier applicable.

Bluegrass Oakwood also argues the two times multiplier is inapplicable to Denney's first injury because she returned to work fully recovered and left her employment because of the second injury. Bluegrass Oakwood argues *Hogston* does not apply to allow a two times multiplier for subsequent injuries. It further argues the two times multiplier cannot apply to Denney's second injury because she never returned to work after her second injury, and the layoff was unrelated to this second injury.

Although the parties stipulated to two injuries, they did not stipulate the injuries were unrelated and had no causal relationship. The term "injury" is a term of art in the workers' compensation statute and is defined in KRS 342.0011(1) as a "work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings." However, there is no indication the parties' intended to be bound by this statutory definition rather than to "injuries" as used in the common vernacular. Referring to the two events as "injuries" is not dispositive of whether the parties intended to exclude the two separate events of trauma to Denney's shoulder from the statutory definition of "injury" or that the ALJ was constrained to interpret the stipulation in that manner. It remained within the ALJ's discretion to determine the cause of Denney's injuries.

The medical evidence indicated the first injury had a casual effect upon the second injury. Both injuries were to Denney's right shoulder. The MRIs after the first and second injury showed a torn rotator cuff. Despite the fact Denney was released to work without restrictions following the first injury, after she returned to work, she continued to feel limited in her movements and experienced pain. This evidence was sufficient to establish Denney's second injury was caused by the impairment, which resulted from her first injury.

The ALJ found the December 6, 2010, injury was the injury when he considered whether KRS 342.730(1)(c)2 applied to allow a two times multiplier for the injury and awarded PPD as of December 7, 2010. The ALJ correctly interpreted *Chrysalis House* and *Hogston* to require that "[s]ubparagraph 2 applies only in the limited instance where the plaintiff returns to work earning same or greater wages but then ceases to do so by reason of a work injury." The ALJ then applied this law to Denney's situation: "I am convinced from the evidence that the multiplier of two does apply in this instance as the plaintiff was taken off work on May 22, 2011 by reason of her work injury." Bluegrass Oakwood's attempt to interpret the stipulation as requiring the ALJ treat the second injury as a subsequent unrelated intervening event is without merit.

The Board did not substitute its own factual findings for those of the ALJ. It simply attempted to clarify the ALJ found one injury. The Board correctly interpreted the ALJ's opinion as making a finding of one injury, with a later exacerbation.

We find no error in the ALJ's finding of one injury and determine the ALJ correctly applied KRS 342.730(1)(c)2 as interpreted by *Chrysalis House* and *Hogston*. Denney sustained a work-related injury on December 6, 2010. She returned to work at a weekly wage equal to or greater than the average weekly wage at the time of the injury and, on May 20, 2011, ceased working due to an exacerbation of her December 6, 2010, disabling injury.

Accordingly, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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