

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000549-WC

BEVERLY JACKSON

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-11-00911

GENTIVA HEALTH SERVICES;
HONORABLE JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: NICKELL, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Beverly Jackson petitions this court for review of an opinion of the Workers' Compensation Board ("Board") affirming an opinion of an Administrative Law Judge ("ALJ") which awarded Jackson certain medical,

temporary total, and permanent partial disability benefits. Jackson argues on appeal that the mileage reimbursement she was paid while employed with Gentiva Health Services (“Gentiva”) was erroneously excluded when calculating her average weekly wage (“AWW”). For the following reasons, we affirm.

Jackson was awarded temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits, and medical benefits for a lower back injury she suffered on March 14, 2011 while working for Gentiva. Jackson was also awarded TTD and medical benefits for another work-related lower back injury she sustained on September 29, 2010. Jackson is a certified nursing assistant, and worked for Gentiva as a home health aide. This position required Jackson to travel to and between patients’ homes. Jackson was paid \$2.50 per mile she traveled while working, excluding the trip to her first patient’s home and the trip from her last patient’s home. She was responsible for filling out a “visit slip” for each client she saw in a day in order to receive mileage reimbursement.

Jackson argued in her Petition for Reconsideration that the ALJ erred in excluding the mileage sums she was paid from her AWW. The request to include mileage reimbursement in Jackson’s AWW was denied and the Board affirmed the ALJ’s decision. This appeal followed.

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. Trimmer*, 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.”).

Computation of an employee’s AWW is determined under KRS¹ 342.140.

KRS 342.140(6) states:

The term “wages” as used in this section and KRS 342.143 means, in addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging, and fuel or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer to the extent the gratuities are reported for income tax purposes.

The term “wages” has been held to only include items that are reported on an employee’s income tax return. *Anderson v. Homeless & Housing COA*, 135 S.W.3d 405, 413 (Ky. 2004). Jackson’s mileage reimbursement can therefore only be considered as part of her “wages” if reported as income for tax purposes.

¹ Kentucky Revised Statutes.

The pay stubs and wage records submitted by Gentiva reflect that the mileage reimbursement paid to Jackson was excluded from her taxable income. Jackson's argument that the mileage payments should be considered "wages" because they provided her with economic "gain" is irrelevant since she did not report that gain as income.

Thus, the ALJ correctly held that the mileage paid to Jackson was merely reimbursement for expenditures made in the course of her employment. Furthermore, reimbursement of expenses does not constitute "wages" under KRS 342.140(6). *Anderson*, 135 S.W.3d at 413. Continued reimbursement is unnecessary when the costs that were being reimbursed are no longer being incurred. Jackson will not incur the cost of traveling between patients' homes while she is unable to work. Jackson argues that she would have been paid the \$2.50 per mile regardless of whether she drove her own vehicle or took public transportation; however, this seems unlikely, and Jackson does not cite any evidence in the record to support such a contention.

Since the mileage reimbursement Jackson received from Gentiva was not reported for income taxes as required by KRS 342.140(6), it should not be included in her "wages" for purposes of calculating her AWW. The Board properly applied the law, and its decision was reasonable on the facts.

The Workers' Compensation Board's decision is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ched Jennings
Louisville, Kentucky

BRIEF FOR APPELLEE
GENTIVA HEALTH CARE:

Joel W. Aubrey
Louisville, Kentucky