

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-002032-WC

HANNA ANDERSSON

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-00773

BARBARA GAMBRELL;
HON. JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE, NICKELL, AND THOMPSON, JUDGES.

NICKELL, JUDGE: Hanna Andersson (Andersson) petitions for review of an opinion of the Workers' Compensation Board (Board) affirming the opinion and order of the Administrative Law Judge (ALJ). Finding Barbara Gambrell suffered

a low back injury while employed as an order processor at Andersson, the ALJ awarded temporary total disability (TTD) benefits and permanent partial disability (PPD) benefits including the three multiplier,¹ enhanced by the .2 multiplier² accounting for Gambrell's age. On appeal, Andersson argues the evidence does not support application of the three multiplier. Having reviewed the record, we affirm.

Gambrell sustained two work-related injuries at Andersson. The first injury, which is the subject of this appeal, occurred on October 20, 2007.

Gambrell injured her low back while lifting a tote. Gambrell returned to work two weeks following her injury. Due to her injury, Gambrell was unable to return to her previous position as an order processor. Instead, she worked in the inventory, relabeling, and "zero slot" departments. Gambrell sustained a second injury to her hip, leg, and knee on October 8, 2009. This second injury is not the subject of the instant appeal.

Gambrell filed a claim seeking medical and income benefits as a result of the two injuries. On April 18, 2011, the ALJ found Gambrell was entitled to PPD benefits, enhanced by the three multiplier based on modifications to her job following the October 20, 2007, low back injury. Andersson filed a petition for reconsideration, which was denied. Andersson appealed to the Board. On October

¹ Under Kentucky Revised Statutes (KRS) 342.730(1)(c)(1), PPD benefits are multiplied by three times the amount determined, "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."

² Under KRS 342.730(1)(c)(3), the multiplier is increased by .2 if the employee was age fifty or older.

28, 2011, the Board remanded this claim to the ALJ with instructions to make further findings pursuant to the Supreme Court's holding in *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003). Specifically, the Board directed the ALJ to evaluate whether Gambrell was able to continue, for an indefinite future, to perform work in which she earned a wage comparable to or greater than the wage earned at the time of her 2007 injury. If she could not, the Board further instructed the ALJ to determine whether her inability to earn comparable or greater wages was related to the effects of the 2007 injury. See *Chrysalis House, Inc. v. Tackett*, 283 S.W.3d 671 (Ky. 2009).

On remand, the ALJ found Gambrell was unable to continue her pre-injury wages as a result of her disability. Gambrell testified she was not given as much overtime as the employees in her previous order processing department. She testified when work was slower, the employees in her current department were dismissed first. The ALJ found Gambrell's testimony to be credible because it was inarticulate, which indicated to the ALJ it was not contrived or rehearsed. By contrast, the ALJ did not find Andersson's witnesses, who testified an economic downturn within the company was the sole reason for Gambrell's reduction in wages, to be credible. The ALJ found the testimony of Janine Refsnider, an Andersson representative, and Michael Lam, the distribution manager, to be general in nature without citing specific facts, other than a chart comparing Gambrell's hours to an unknown employee in the order processing department. The ALJ found Andersson did not satisfy its burden to prove its affirmative

defense that Gambrell's wages were affected by economic downturn.³ The ALJ further determined Gambrell's injury would make it "extremely difficult" to earn her pre-injury wages with another employer. As such, the ALJ applied the three multiplier on remand. On review, the Board affirmed the ALJ's opinion and order. This appeal follows.

The ALJ, as fact-finder, has sole authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). When conflicting evidence is presented, the ALJ may choose whom and what to believe. *Pruitt v. Bugg Brothers*, 547 S.W.2d 123, 124 (Ky. 1977). The Board is charged with deciding whether the ALJ's finding "is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law." KRS 342.285; *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000). The function of this Court on review is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or has committed an error in assessing the evidence so flagrant as to cause gross injustice. *See Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992).

The enhancement of income benefits for PPD is governed by KRS 342.730(1)(c), which provides, in pertinent part, as follows:

³ The ALJ appears to have erroneously shifted the burden of proof to Andersson by requiring it to prove economic downturn as an "affirmative defense." "[T]he claimant bears the burden of proof and the risk of non-persuasion before the fact-finder with regard to every element of a workers' compensation claim." *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). We decline to address this issue because it is unpreserved for appellate review.

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

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.

“An ALJ is authorized to determine which provision is more appropriate on the facts.” *Fawbush*, 103 S.W.3d at 12. “If the evidence indicates that a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for an indefinite future, the application of paragraph (c)1 is appropriate.” *Id.*

First, Andersson argues KRS 342.730(1)(c)2 is most applicable to this case because Gambrell’s average weekly wage (AWW) during her highest post-injury earning quarter was \$668.09 per week, which was greater than her pre-injury AWW of \$630.31. Furthermore, Andersson claims Gambrell could have continued to perform this job until her retirement.

Contrary to Andersson's assertion, the fact that Gambrell earned a higher AWW for one quarter following her injury does not necessarily require application of paragraph (c)2. In *Fawbush*, the plaintiff returned to work following an injury at a greater wage, but the post-injury work exceeded his medical restrictions, and he was only able to perform the work by taking excess narcotic medication. The Supreme Court held it was appropriate for the ALJ to apply the three multiplier of paragraph (c)1, because it was unlikely the plaintiff could maintain the higher paying employment for an indefinite period of time.

In the instant matter, the ALJ determined Gambrell had only one quarter of higher wages following her injury. Notwithstanding this quarter, the ALJ found Gambrell had a "long history" of earning lower wages following her injury. Therefore, the ALJ found Gambrell could not indefinitely earn the higher wage. We hold the ALJ did not err in declining to apply paragraph (c)2 based upon the fact that Gambrell earned a higher wage for only one quarter following her injury.

Next, Andersson argues the ALJ failed to properly consider the evidence it proffered to support the conclusion that Gambrell's wage was affected by an economic downturn within the company, and was unrelated to the effects of her injury. We disagree.

The language of KRS 342.730(1)(c)1 makes it clear that the three multiplier benefits enhancement is applicable only if an employee cannot return to the type of work performed at the time of injury if the cause is "due to an injury."

See also Chrysalis House, Inc. (holding the two multiplier enhancement is only available if post-injury employment at the same or greater wages ceases as a result of the disabling injury).

Andersson argues it presented uncontroverted evidence that Gambrell's post-injury decrease in wages resulted from an economic downtown and was unrelated to her injury. However, the ALJ has discretion to choose which evidence to believe. *Pruitt*, 547 S.W.2d at 124. The ALJ did not find Andersson's witnesses to be credible. Instead, the ALJ was persuaded by Gambrell's testimony, finding it to be sincere and unrehearsed. We hold there is substantial evidence to support the ALJ's findings, and as such, we must affirm the Board's decision.

For the foregoing reasons, the opinion and order of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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