RENDERED: OCTOBER 3, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000761-WC

ROBERT FRANKLIN APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-73745

BRYANT HEATING & COOLING,
INC./TOP QUALITY SERVICE, INC.;
HON. JONATHAN R. WEATHERBY, JR.,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

AND NO. 2013-CA-000940-WC

BRYANT HEATING & COOLING,
INC./TOP QUALITY SERVICE, INC. CROSS-APPELLANT

v.

CROSS- PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-73745

ROBERT FRANKLIN; HON. JONATHAN
R. WEATHERBY, JR., ADMINISTRATIVE
LAW JUDGE; ANDWORKERS'
COMPENSATION BOARD CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MAZE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Robert Franklin has petitioned for review of an opinion of the Workers' Compensation Board (Board) affirming the opinion and award of the Administrative Law Judge (ALJ). Bryant Heating & Cooling/Top Quality Service, Inc. (Bryant) cross-petitions. Having reviewed the record, we affirm.

Franklin sustained a work-related injury at Bryant on November 4, 2009, after falling eight to ten feet from a ladder. Franklin sustained injuries to both arms. He was initially treated by Dr. Navin Kilambi, who diagnosed a right shoulder fracture. Franklin was off work until November 20, 2009, and received temporary total disability (TTD) benefits. Returning to work on November 21, 2009, he was restricted to light-duty work. He was released to full-duty work on February 1, 2010; however, he was terminated on February 8, 2010, for reasons unrelated to his injury.

Franklin applied for workers' compensation benefits on November 18, 2011. In support of his claim, Franklin relied upon the medical reports of Drs. Mark Barrett and Warren Bilkey. Dr. Barrett confirmed Franklin sustained a right shoulder fracture as a result of the work-related incident. He initially assessed a 3% permanent impairment rating in accordance with the American Medical Assocation (AMA) *Guides to the Evaluation of Permanent Impairment (Guides)*,

but later amended this rating to a 6% impairment. Dr. Bilkey assessed a 6% impairment rating pursuant to the AMA *Guides*. Bryant relied upon the independent medical examation (IME) report of Dr. Martin Schiller. Dr. Schiller assessed a 3% permanent impairment rating under the AMA *Guides*, which he attributed to the work-related right shoulder injury. Dr. Schiller also diagnosed possible symptoms of subacromial bursitis and/or impingement, which he found were treatable and not work-related.

Following a hearing, the ALJ issued an opinion and award on July 20, 2012. The ALJ found Franklin was entitled to permanent partial disability (PPD) benefits as a result of the work-related right shoulder injury, for which he determined Franklin had sustained a 3% permanent whole person impairment. Based upon Dr. Schiller's opinion, the ALJ further found Franklin's subacromial bursitis and impingement conditions were not compensable injuries as defined by the Workers' Compensation Act (Act).

The ALJ also found Franklin had worked for a total of twenty-three weeks prior to his injury. Calculating Franklin's average weekly wage (AWW) pursuant to KRS[1] 342.140(1)(d), the ALJ found the AWW during the thirteen-week quarter immediately prior to his injury was $372.94. While this was the only quarter during which Franklin worked a complete thirteen weeks, the ALJ also considered the first quarter of Franklin's employment where he worked ten weeks. The ALJ divided the wages Franklin earned during the first ten weeks of his

[1] Kentucky Revised Statutes.

employment by thirteen, yielding $452.06. The ALJ found this amount to be Franklin's AWW because it was most favorable to him.

Franklin's subsequent petition for reconsideration was denied. Franklin appealed to the Board, and Bryant cross-appealed. On March 22, 2013, the Board entered an opinion affirming the ALJ. The Board held the ALJ did not err in determining Franklin's subacromial bursitis and impingement had not been caused or aroused by the 2009 work-related fall, and were, therefore, not injuries covered under the Act. The Board also rejected Franklin's request for payment of unpaid medical bills. The Board held Franklin failed to introduce any unpaid medical bills before the ALJ, and because the Board lacked fact-finding authority, there was no issue for it to decide. Lastly, the Board affirmed the ALJ's AWW calculation, holding the ALJ properly relied on KRS 432.140(1)(d) by dividing the total wages Franklin earned in each quarter by thirteen, and crediting Franklin with the most favorable AWW. This appeal followed.

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). On review, the

function of this Court 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).

Franklin first alleges the ALJ erred in calculating his AWW. Franklin argues the ALJ should have divided the wages earned during the quarter where he worked ten weeks by ten, rather than thirteen. Relying on *Marsh v. Mercer Transportation*, 77 S.W.3d 592 (Ky. 2002), and *Huff v. Smith Trucking*, 6 S.W.3d 819 (Ky. 1999), Franklin claims an ALJ should take into account the unique facts and circumstances of his case when calculating AWW, such as the "seasonable nature" of the air conditioning and heating business. In its cross-appeal, Bryant argues the ALJ is prohibited from calculating the AWW based on a quarter in which Franklin worked less than thirteen weeks.

The AWW of an hourly worker who works at least thirteen weeks is calculated in accordance with KRS 342.140(1)(d), which provides, in pertinent part:

> the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the injury[.]

We hold the ALJ properly calculated Franklin's AWW. The plain, unambiguous language of the statute explicitly requires an ALJ to divide an employee's wages in

each quarter by thirteen, and there is no exception for dividing by the actual number of weeks worked by an employee. Franklin's reliance on *Huff* and *Marsh* is misplaced. These cases do not involve KRS 342.140(1)(d) because neither case concerned an hourly employee who worked at least thirteen weeks. Contrary to Franklin's assertion, there is no authority for the ALJ to ignore the explicit direction of KRS 342.140(1)(d) to consider other unique circumstances of a case, including the alleged "seasonal nature" of Franklin's employment. Likewise, we find no merit in Bryant's argument on cross-appeal. KRS 342.140(1)(d) does not prohibit an ALJ from using a quarter where the employee worked less than thirteen weeks. As such, we affirm the ALJ's AWW calculation.

Next, Franklin argues the ALJ erred in finding his subacromial bursitis and/or impingement conditions were not work-related injuries as defined by the Act. Franklin argues case law does not support the ALJ's conclusion because many awards have been rendered based on these conditions. Franklin argues Dr. Schiller, who diagnosed subacromial bursitis and impingement, does not state these conditions are not part of his injury, or that these conditions will always be benign. We disagree.

The claimant in a workers' compensation case bears the burden of proving each of the essential elements of his cause of action before the ALJ, including whether he sustained an "injury" as defined by the Act. *Snawder v. Stice,* 576 S.W.2d 276 (Ky. App. 1979). The question on appeal is whether the evidence was so overwhelming, upon consideration of the record as a whole, as to

compel a finding in Franklin's favor. *Wolf Creek Collieries v. Crum,* 673 S.W.2d 735 (Ky. App. 1984).

Contrary to Franklin's assertion, Dr. Schiller diagnosed "possible" subacromial bursitis which was "easily treatable and not related to the accident," and found his impingement was "not related to a fall or the fracture." As there are no medical opinions of record to rebut Dr. Schiller's opinions, clearly there is substantial evidence to support the ALJ's finding that subacromial bursitis and impingement were not part of his work-related right shoulder injury, as defined by the Act. As such, we find Franklin's argument without merit.

Finally, Franklin argues he should be allowed payment of unpaid medical expenses incurred prior to the ALJ's opinion. Franklin alleges there was an agreement between the parties to allow them to resolve unpaid medical bills after the hearing. As evidence of this agreement, Franklin cites statements by his attorney at the hearing referring to a prior agreement. In its response brief, Bryant denies any such agreement exists, and denies there are any unpaid medical bills.

There is no documentary evidence in the record of an agreement to allow the parties to resolve unpaid medical bills after the hearing. There is no reference to such an agreement in either the Benefits Review Conference order or the ALJ's opinion. More significantly, Franklin fails to identify any unpaid medical bills. Consequently, it appears there is no justiciable issue before this Court for determination. This Court will not render advisory opinions or consider

matters which may or may not occur in the future. *Nordike v. Nordike*, 231 S.W.2d 733 (Ky. 2007).

For the foregoing reasons, the opinion of the Board is affirmed.

CLAYTON, JUDGE, CONCURS.

MAZE, JUDGE, CONCURS IN RESULT ONLY.

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