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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000626-WC

DELENA TIPTON

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-10-89621

TRANE COMMERCIAL SYSTEMS; HON.
THOMAS G. POLITES, Administrative Law
Judge; and WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * ** * **

BEFORE: COMBS, STUMBO, AND THOMPSON, JUDGES.

COMBS, JUDGE: Delena Tipton petitions for review of an opinion of the
Workers' Compensation Board that affirmed the decision of the Administrative
Law Judge (ALJ). The ALJ awarded total disability benefits, permanent partial

disability benefits, and future medical benefits for an injury sustained while Tipton was employed by Trane Commercial Systems. Tipton contends that the Board erred by failing to conclude that she was entitled to a further award of temporary, total disability benefits and to an award of permanent partial disability benefits enhanced by the statutory triple multiplier. After our review, we affirm in part and reverse in part and remand.

Tipton began work for Trane in February 1990. On May 6, 2010, she was working at her usual job testing commercial air-conditioning units when she fell and injured her right knee. Tipton gave proper and timely notice of the injury to her employer and was treated for a non-displaced fracture of the patella. She was paid temporary total disability benefits from May 6, 2010, through March 22, 2011.

On March 23, 2011, Tipton returned to light-duty work. Her work restrictions were readily accommodated, and she was assigned to the much less physically demanding task of building circuit boards. While her pre-injury assignment required nearly constant stooping and bending in addition to frequent squatting, Tipton could now sit or stand in a stationary position to do her work depending upon her preference.

On July 7, 2011, Tipton was released to return to her regular work assignment with a time restriction limiting her to not more than eight hours of work per day. However, she requested to continue the assignment building of circuit boards on a permanent basis and was permitted by Trane to do so.

On July 24, 2013, Tipton's physician released her to return to work at the same assignment that she was performing at the time of her injury -- but only if she was not required to bend or to climb constantly. Nevertheless, Tipton has remained at the same task of building circuit boards since her return to work on March 23, 2011. This work assignment is at the same pay grade as her former, pre-injury work assignment. Tipton's treating physician assessed a 3% impairment rating pursuant to the AMA's guidelines for worker disability ratings.

On February 25, 2013, Tipton filed an Application for Resolution of Injury Claim. She testified by deposition on April 19, 2013, and at the hearing conducted on August 8, 2013.

After analyzing the evidence, the ALJ determined that Tipton was entitled to permanent partial disability benefits and that those benefits would be calculated upon a 3% impairment rating. He also determined that two different multipliers might apply to enhance her benefits. Since Tipton did not retain the physical capacity to return to her previous work assignment, the ALJ concluded that she was potentially entitled to an enhancement of her permanent award through the application of the three multiplier provided by Kentucky Revised Statute[s] (KRS) 342.730(1)(c)1. However, he also determined that Tipton's return to work at a wage equal to or greater than her average weekly wage at the time of her injury triggered the application of KRS 342.730(1)(c)2, providing for the potential enhancement of her permanent partial disability benefits by the two multiplier.

Applying the analysis prescribed by the Supreme Court of Kentucky in *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003), the ALJ concluded that Tipton would likely continue to earn the same or greater level of wages for the indefinite future. Thus, he determined that her weekly benefit for permanent partial disability could only be enhanced pursuant to the provisions of KRS 342.730(1)(c)2 (the two multiplier).

Next, the ALJ considered whether Tipton was entitled to an additional period of temporary total disability benefits from March 23, 2011, through July 7, 2011. The ALJ concluded that Tipton was not entitled to benefits during this period since she had returned to work at an assignment that was very similar in nature to the work she had been assigned to perform at the time of injury at the same hourly rate of pay – if not greater. Under those circumstances, the ALJ considered an award of an additional period of temporary total disability benefits to be inappropriate.

On October 28, 2013, Tipton filed a petition for reconsideration. In an order rendered November 25, 2013, the ALJ denied the petition. On appeal, the Workers' Compensation Board affirmed.

As the claimant, Tipton had the burden of proving each of the essential elements of her claim. If the party with the burden of proof and risk of persuasion is unsuccessful before the ALJ, the question on appeal becomes whether the evidence compels a finding in her favor. *Paramount Foods, Inc. v. Burkhardt*, Ky., 695 S.W.2d 418 (Ky. 1985). In order to be deemed compelling, evidence

must be so overwhelming that no reasonable person could reach the same conclusion as the ALJ. *REO Mechanical v. Barnes*, 691 S.W.2d 224 (Ky.App. 1985).

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 (Ky. 2000). When reviewing the Board's decision, we may reverse *only where it has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice*. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685 (Ky. 1992).

First, we consider whether the Board erred by affirming the ALJ's decision to deny Tipton's request for enhancement of her permanent partial disability benefits by the three multiplier. We conclude that it did not.

KRS 342.730(1)(c)1 provides that if 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 the permanent partial disability shall be three times the amount otherwise determined under KRS 342.730(1)(b); that is, the permanent disability rating. But KRS 342.730(1)(c)2 provides that 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 KRS 342.730(1)(b) for each week during which that level of employment is sustained. The section goes on to provide that 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 cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. The Kentucky Supreme Court has construed this section to allow double benefits only if the cessation of the employment was related to the disability arising from the work injury. *Chrysalis House, Inc. v. Tackett*, 283 S.W.3d 671, (Ky. 2009).

Tipton contends that she is entitled to the application of the triple multiplier because she does not retain the physical capacity to return to the type of work that she performed prior to her injury. Trane Construction argues that the application of the statutory multiplier is inapplicable since Tipton has returned to work at an average weekly wage equal to or greater than the average weekly wage that she was earning at the time of her injury. Furthermore, the company argues that no evidence suggests that Tipton will not continue to earn these wages for the indefinite future.

In *Chrysalis House, supra*, the Supreme Court of Kentucky explained the relationship between KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2 as follows:

KRS 342.730(1)(c)1 compensates a worker who does not retain the physical capacity to return to the type of work performed at the time of the injury with a triple benefit. Consistent with KRS 342.710(1), 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.

283 S.W.3d at 674. (footnotes omitted).

In *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003), the Supreme Court of Kentucky decided that where both the provisions of KRS 342.730(1)(c)1 and 1(c)2 are applicable (as is the case before us), the ALJ must decide which provision is more appropriate by determining whether the injured employee is likely to continue to earn a wage that equals or exceeds his or her wages at the time of the injury for the indefinite future.

Fawbush involved an individual whose entire work history consisted of manual labor. As of the hearing date, he earned a greater wage than he had received at the time of his injury, but he worked outside his restrictions and required more than the prescribed amount of narcotic pain medication to do so. The court found that the ALJ's application of KRS 342.730(1)(c)1 was appropriate since the evidence indicated that, given the difficult circumstances under which he was working, the worker would not likely be able to continue in the employment indefinitely.

In *Adkins v. Pike County Board of Education*, 141 S.W.3d 387 (Ky.App. 2004), we explained that the *Fawbush* analysis includes a broad range of factors, only one of which is the ability to perform the current job. The focus of the decision is whether the injury has permanently altered the worker's ability to earn an income. The application of KRS 342.730(1)(c)1 is appropriate where an

individual returns to work at the same or a greater wage but is unlikely to be able to sustain that level of activity for the indefinite future. *See Adams v. NHC Healthcare*, 199 S.W.3d 163 (Ky.App. 2006).

In this case, based upon the evidence, the ALJ found that Tipton would likely be able to continue to earn a wage that equals or exceeds her wage at the time of injury. The ALJ observed as follows:

[Tipton's] current job in which she is earning greater wages is sit down work which the [she] has no physical difficulty in performing despite her ongoing symptoms in her injured knee. The ALJ also notes [Tipton] has been employed with the employer for approximately 22 years which is evidence of a stable employment relationship and she is a member of a union which provides some degree of job protection for [her]. In addition the employer seems to have been cooperative in providing [Tipton] the opportunity to perform less physically demanding work that is consistent with [her] ongoing symptoms and restrictions. Further [Tipton] testified she attended two years of college although she did not obtain a degree which demonstrates [Tipton] has the intellectual capacity to perform work other than factory or manual labor and that she is suited for vocational rehabilitation from a cognitive standpoint. Also, the wage records reflect [Tipton] has been able to earn more in the year 2012 than in the years 2009, 2010, and 2011. Lastly, it should be remembered that Dr. Huff placed minimal restrictions on [Tipton's] functional activity and only restricted her from constant bending and climbing and the ALJ infers from these minor restrictions [Tipton] has the physical ability to perform a wide range of jobs and in fact, nearly the entire range of jobs she would have been able to perform prior to her injury.

The Board carefully evaluated the evidence in this case. It observed that the ALJ had provided a detailed analysis setting forth a clear and adequate basis for his

determination that Tipton's permanent partial disability award was not to be enhanced by the triple multiplier. The Board concluded that the ALJ's decision was reasonable in light of the evidence and the applicable law and that it could not be reversed upon any basis. The ALJ considered the appropriate factors and applied the statutory provisions as required. The Board did not overlook or misconstrue controlling law or commit an error in assessing the evidence on this point – much less an error so flagrant as to cause gross injustice in this case.

Next, we consider whether Tipton was entitled to an award of temporary total disability income benefits for the period from March 23, 2011, through July 7, 2011. The ALJ concluded that while Tipton did not reach maximum medical improvement until July 7, 2011, she was not entitled to benefits during this period since she had returned to work at an assignment that was very similar in nature to the work she had been assigned to perform at the time of injury at the same hourly rate of pay – if not greater. Under those circumstances, the ALJ considered an award of an additional period of temporary total disability benefits to be inappropriate.

In *Bowerman v. Black Equipment Co.*, 297 S.W.3d 858, 874-75 (Ky.App. 2009), we explained the law governing an award of temporary total disability benefits – TTD – as follows:

Entitlement of a workers' compensation claimant to TTD benefits is a question of fact to be determined in accordance with KRS 342.0011(11)(a). Statutory interpretation is a matter of law reserved for the courts and courts are not bound the ALJ's or the Board's

interpretation of a statute. *Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327, 329-30 (Ky.App. 2000). Indeed, it is the appellate court's province to ensure that ALJ decisions, and the Board's review thereof, are in conformity with the Workers' Compensation Act. KRS 342.290; *Whittaker v. Reeder*, 30 S.W.3d 138, 144 (Ky. 2000).

TTD is statutorily defined in KRS 342.0011(11)(a) as “the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment[.]” In *Central Kentucky Steel v. Wise*, 19 S.W.3d 657 (Ky.2000), the Supreme Court of Kentucky established how the statutory definition was to be interpreted and applied in determining the duration of any appropriate award of TTD benefits. In *Wise*, the employer argued KRS 342.0011(11)(a) required termination of TTD benefits as soon as an injured worker is released to perform any type of work. However, relying upon the plain language of KRS 342.0011(11)(a), the Supreme Court held “[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury.” *Id.* at 659. Thus, a release “to perform minimal work” does not constitute a “return to work” for purposes of KRS 342.0011(11)(a).

Thus, as defined by the statute, there are two requirements for an award of TTD benefits: first, the worker must not have reached MMI; and, second, the worker must not have reached a level of improvement that would permit him to return to the type of work he was performing when injured or to other customary work. Absent either requirement, a worker is not entitled to TTD benefits. Furthermore, pursuant to the construction assigned under *Wise*, KRS 342.0011(11)(a) takes into account two distinct realities: first, even if a worker has not reached MMI, temporary disability can no longer be characterized as total if the worker is able to return to the type of work performed when injured or to other customary work; and, second, where a worker has

not reached MMI, a release to perform minimal work does not constitute “a level of improvement that would permit a return to employment” for purposes of KRS 342.0011(11)(a).

The purpose of awarding income benefits, such as TTD, was explained by the Supreme Court in *Double L. Construction, Inc. v. Mitchell*, 182 S.W.3d 509 (Ky.2005), which applied the two-pronged TTD standard announced in *Wise*. The Supreme Court held:

[t]he purpose for awarding income benefits such as TTD is to compensate workers for income that is lost due to an injury, thereby enabling them to provide the necessities of life for themselves and their dependents.

Id. at 514. The Court clarified that TTD is not based on a finding of AMA impairment, nor based on an inability to perform any type of work. *Id.* at 515.

Tipton contends that she was entitled to a further award of temporary total disability benefits during the light-duty period since it is undisputed that she was not able to return to her customary work or to the work that she was performing at the time of her injury. We find support for the argument in our analysis of the issue in *Bowerman, supra*.

In *Bowerman*, the claimant’s customary work at Black Equipment was as a forklift operator, and this was the type of work that he was performing for his employer when he suffered his work-related injury. According to Bowerman’s uncontradicted testimony, his pre-injury work duties as a forklift operator included “lots of heavy lifting, doing engine repairs, pulling heads off, pulling motors out, transmissions, brake jobs, and pulling wheels and tires off.” *Id.* at 876.

Bowerman sustained a work-related back injury on October 14, 2004, and his doctor assigned him restrictions that allowed him to return to some light work activities. *Id.* at 861. From October 25, 2004, to April 22, 2005, Bowerman continued working at Black Equipment in a light-duty capacity. There is no indication from the opinion whether Bowerman's hours of work or wages were reduced in this position. But, with respect to his duties, the court observed that:

He was kept in the office in the parts room. He cleaned the office, took out the garbage, filled parts orders and pulled parts for customers. He said that he had problems performing this job because there was a lot of reaching involved. Some parts were too heavy and he could not pick them up. He could not kneel down or get down on his knees. His service manager, Donnie Hertter [,] would assist him in this job.

Id. at 876.

Upon review, we determined that even though Bowerman had resumed working for Black Equipment as of October 25, 2004, his ability to perform the light duties assigned to him merely demonstrated that Bowerman was capable of returning to “some form of work,” as opposed to the “type of work he had performed at Black when injured or to other customary work,” and therefore did not evince a “return to employment” within the meaning of KRS 342.0011(11)(a).

Id. Thus, *Bowerman*, indicates that light-duty assignments consisting of duties entirely different from pre-injury work duties cannot be considered a “return to employment” for the purpose of awarding TTD.

In this case, Tipton indicated that she had never been assigned to wire circuit boards before she went back to work under the light-duty restriction. She indicated that building boards was not her customary job, nor was it the type of work that she had performed at Trane at the time of her injury. Nothing in the record indicates that the various duties that Tipton was assigned to perform prior to her injury were similar to the duties to which she was assigned post-injury. Finally, it is undisputed that Tipton had not reached maximum medical improvement until July 7, 2011.

Based upon the reasoning of *Bowerman, supra*, we conclude that Tipton was entitled to temporary total disability benefits for the period from March 23, 2011, through July 7, 2011. During this period and as a result of her work-related injury, Tipton's work assignment was entirely different from the work she performed customarily, and she was unable to sustain the level of activity, including stooping, bending, and squatting, that were integral to her pre-injury assignment of testing commercial air-conditioning units. Thus, the light-duty assignment cannot be considered a "return to employment" for the purpose of limiting an award of temporary total disability benefits.

To summarize, we conclude that the Board did not err in its determination that the ALJ's decision was reasonable with respect to his award of permanent partial disability benefits pursuant to the two multipliers (as distinguished from the three multipliers). The ALJ considered the appropriate factors and applied the statutory provisions as required. The Board did not overlook or misconstrue

controlling law or commit an error in assessing the evidence on this point so flagrant as to cause gross injustice. However, under the circumstances, we also conclude that Tipton was entitled to a further award of temporary total disability benefits and that the Board erred by misinterpreting the controlling law with respect to such an award. Consequently, we remand for an appropriate award of these benefits.

STUMBO, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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