

RENDERED: FEBRUARY 6, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000380-WC

KEVIN REECE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-72669

INTEGRAL STRUCTURES, INC.,
HON. CHRIS DAVIS, ADMINISTRATIVE
LAW JUDGE and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KRAMER, J. LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: Kevin Reece has petitioned for review of an opinion of the
Workers' Compensation Board (Board) affirming the opinion and award of the
Administrative Law Judge (ALJ). The Board had previously remanded the matter

to the ALJ for determination of whether the two-multiplier mentioned in KRS¹ 342.730(1)(c)(1)(2) was applicable. Having reviewed the record, we affirm.

Reece's claim for workers' compensation benefits stems from a work-related injury at Integral Structures, Inc. (Integral) on October 25, 2006. Integral constructs pre-fabricated metal buildings. Reece was an ironworker, but occasionally performed supervisory duties. On the date of his injury, Reece was refurbishing storage units. While replacing an overhead garage door, a metal bracket broke and struck Reece's nose and left eye, fracturing his eye socket. Reece was taken to the hospital, and underwent reconstructive surgery. Initially, he missed approximately thirty days of work.

As a result of the accident, Reece experiences difficulty with depth perception, light sensitivity and blurred vision. He continued to work without restrictions until undergoing a second surgery on March 12, 2007. He returned to work three months after the second surgery.

Reece provided Integral a letter from his treating physician, Dr. Louis Cantor, dated November 25, 2008, describing several work restrictions. Dr. Cantor explained Reece would have difficulty performing tasks requiring good binocular vision and depth perception. He also noted sensitivity to environmental and work-related irritants, such as dirt and smoke.

Reece testified he earned \$15.50 per hour at the time of the accident, which he continued to earn until January 2008, when his hourly wage increased to

¹ Kentucky Revised Statutes.

\$17.50. Reece testified he was no longer assigned to lead or supervisory roles after his injury, and was unable to work on rooftops or at heights.

On October 21, 2009, the ALJ issued an opinion, order, and award finding Reece had sustained a 14% permanent whole person impairment, and awarded permanent partial disability (PPD) benefits. Despite the formal restrictions given by Dr. Cantor, the ALJ further found there was no evidence Reece was restricted from the work he actually performed. As such, the ALJ concluded Reece was not entitled to enhancement of his benefits by the three-multiplier.²

After his petition for reconsideration was denied, Reece appealed to the Board. The Board affirmed the ALJ's finding of a 14% whole person impairment, and agreed Reece was not entitled to enhancement by the three-

² The enhancement of PPD benefits is governed by KRS 342.730(1)(c), which provides, in pertinent part, as follows:

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.

multiplier. However, the Board remanded the matter to the ALJ for an additional finding concerning whether Reece was entitled to application of the two-multiplier. The Board directed the ALJ to determine whether Reece had returned to work at an average weekly wage (AWW) equal to or greater than the AWW earned at the time of injury, and whether there was a cessation of that AWW. If there was a cessation, the ALJ was instructed to determine whether it was a result of Reece's disability. Reece's appeal of the Board's decision to this Court dismissed as untimely, a decision affirmed by our Supreme Court.³

On September 11, 2012—while his claim was pending on remand before the ALJ—Reece filed a motion to reopen. Reece claimed there was evidence Integral had drastically reduced his hours during the period after the claim was originally submitted for a decision on September 25, 2009, and his termination on November 20, 2009. In support of his motion to reopen, Reece submitted two affidavits outlining events occurring after the claim was submitted to the ALJ. The ALJ granted the motion, ordered the claim reopened, established a proof schedule, and held a hearing on February 26, 2013.

During the hearing, Reece testified he was provided regular work until late September 2009. On September 28-29 and October 5, 2009, he was told by a project manager to stay at home due to a lack of work. After being assigned to a job site on October 6, 2009, Reece was sent home for the day after refusing to

³ *Reece v. Integral Structures, Inc.; Honorable Chris Davis, Administrative Law Judge; and Workers' Compensation Board*, No. 2011-SC-000532-WC, 2012 WL 1899796 (May 24, 2012, unpublished).

perform work on scaffolding in the rain. Reece returned to work the following day, but was not assigned work duties. Reece worked in the shop the next four weeks performing cleaning and organizing duties. He was laid off on November 20, 2009, along with two other employees, and remained unemployed until February, 2012.

Thomas Eckert, president of Integral, testified by deposition. Eckert testified Reece was paid on the days he was sent home for lack of work. Eckert attributed the reduced hours and layoffs to a downturn in business. Both Reece and Integral submitted business records into evidence, including employee hours and assignments, records from the Division of Unemployment Insurance, and monthly deposit documents from January 2009 through December 2012.

On April 24, 2013, the ALJ issued an opinion and order on remand, and a separate opinion and order on reopening. In both decisions, the ALJ found Reece's post-injury hourly rate of pay equaled or exceeded his pre-injury hourly rate of pay. The ALJ further found Integral's business records showed a decline in business during the timeframe in question. As such, the ALJ found Reece experienced a gradual decline in hours and was ultimately laid off as a result of a decline in Integral's business. The ALJ determined Reece's reduction in hourly wage was unrelated to his injury, and therefore he was not entitled to application of the two-multiplier.

Reece appealed the ALJ's opinion and order on remand to the Board.⁴

On January 31, 2014, the Board affirmed the ALJ's opinion and order. Holding Reece bore the burden of proving cessation of his pre-injury wages was related to his work-related injury, the Board determined substantial evidence supported the ALJ's decision. The Board further found no merit to Reece's argument the ALJ erred in considering evidence outside the time period in question. 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 we perceive the Board has overlooked or misconstrued controlling statutes or precedent, or has committed a flagrant error in assessing the evidence so as to cause gross injustice. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992).

On appeal, Reece argues the ALJ misunderstood the evidence regarding the reason for his decreased wages. He asserts the ALJ never stated a

⁴ Reece did not appeal the ALJ's opinion and order on reopening.

reasonable basis for concluding the decrease in wages from August 18, 2007, until August 25, 2009—the date the original claim was submitted to the ALJ—was unrelated to his work injury. Reece maintains the ALJ erred by relying upon Integral’s business records from 2010-2012—evidence filed in the reopened claim—because the decision in the original action should have been based solely upon the evidence of record on August 25, 2009.⁵

It has long been accepted an ALJ has broad discretion to control the taking and presentation of proof in a workers' compensation proceeding. *New Directions Housing Authority v. Walker*, 149 S.W.3d 354, 358 (Ky. 2004); *Elkhorn Coal Co. v. Bates*, 236 S.W.2d 946, 949 (Ky. 1951). As Reece notes, when the Board initially remanded this claim, it directed the ALJ to evaluate whether the two-multiplier applied “based on the evidence of record at the time the claim was submitted.” However, upon Reece’s motion to reopen, both parties filed additional evidence—including business records from 2010-2012. These records supplemented prior business records submitted when the claim was initially before the ALJ. In summarizing the evidence of record, the ALJ referred to business records filed before and after August 2009; and in weighing the evidence, the ALJ found “the business records of the Defendant are clear and convincing that during the timeframe in question the Defendant’s total level of business was in decline.” Given these circumstances, we hold the ALJ was not required to parse the records

⁵ Integral filed business records in the reopened claim from 2010-2012 on March 3, 2013. Reece also filed business records on the reopened claim on April 9, 2013.

by date in the claims on remand and reopening. As the evidentiary record was reopened by Reece's motion, the ALJ did not abuse his discretion in combining the business records and considering them as a whole.

Reece also argues the ALJ's decision must be reversed because it is arbitrary and based on less than substantial evidence. Reece claims business records dated 2010-2012 cannot explain the state of Integrity's business prior to August 25, 2009. We disagree.

"If there is any substantial evidence to support the action of the administrative agency, it cannot be found to be arbitrary and will be sustained." *Taylor v. Coblin*, 461 S.W.2d 78, 80 (Ky. 1970). Our review of the record reveals substantial evidence supportive of the ALJ's decision not to enhance Reece's benefits with the two-multiplier.

The ALJ found the only proof Reece's hours were reduced due to his injury was his own testimony. Being unconvinced by Reece's personal opinion and subjective interpretation of events, the ALJ found Reece's testimony was unpersuasive and insufficient to meet his burden of proving entitlement to the two-multiplier. Finding Reece's reduced hours were the result of a downturn of Integral's business, the ALJ was convinced the evidence showed Reece was not entitled to the two-multiplier.

Contrary to Reece's argument, we hold the ALJ did not err in according weight to the business records as a whole to find Integral experienced a downturn in business during the timeframe in question. In addition to business

records, the ALJ also relied upon Eckert's testimony explaining he had to lay off and reduce employee hours due to a decline in business. As such, the ALJ's decision was supported by substantial evidence and, therefore, was not arbitrary.

Id.

Lastly, Reece claims the burden of proving whether the cessation of pre-injury wages was due to the work injury lies with Integral. Reece maintains it is an "unrealistic burden" for an employee to prove his employer reduced his wages for reasons related to the injury, and employers are incentivized to manufacture other reasons for their actions. Reece notes other situations where employers bear the burden of proof, including proving affirmative defenses.

There is no authority for Reece's argument the burden shifted to Integral to prove reduced wages were unrelated to the work injury. To the contrary, it is well-established a "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). Unlike an affirmative defense, entitlement to a statutory multiplier is an element of entitlement to benefits; therefore, Reece bore the burden of proving cessation of greater or equal wages was related to his work injury. He failed to do so, as the ALJ correctly concluded.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Udell B. Levy
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BRIEF FOR APPELLEE, INTEGRAL
STRUCTURES, INC.:

Rodney J. Mayer
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