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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001135-WC

CARRIE REED — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-11-82474

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC. AND WORKERS' COMPENSATION BOARD — APPELLEES

AND NO. 2014-CA-001251-WC

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC. — CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-11-82474

CARRIE REED,
WORKERS' COMPENSATION BOARD
AND HON. JEANIE OWEN MILLER, ALJ CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: Carrie Reed has petitioned for review of the June 17, 2014, opinion of the Workers' Compensation Board ("Board") which affirmed in part, vacated in part, and remanded a decision of the Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits enhanced by the three-multiplier pursuant to KRS[1] 342.730(1)(c)2, and medical benefits for work-related injuries sustained during her employment with Toyota Motor Manufacturing, Kentucky, Inc. ("TMMK"). TMMK has cross-petitioned for review of the Board's decision affirming the ALJ's calculation of the duration of TTD benefits for which Reed was entitled. Following a careful review, we affirm.

Initially, we note it is well-established that a claimant in a workers' compensation claim bears the burden of proving each of the essential elements of her cause of action. *Burton v. Foster Wheeler Corp.,* 72 S.W.3d 925, 928 (Ky. 2002). Since Reed was successful in persuading the ALJ her claim was

[1] Kentucky Revised Statutes.

compensable, the question on appeal is whether there was substantial evidence of probative value to support the ALJ's conclusion. *Wolf Creek Collieries v. Crum,* 673 S.W.2d 735 (Ky. App. 1984). Substantial evidence is defined as evidence of relevant consequence, having fitness to induce conviction in the minds of reasonable people. *Smyzer v. B.F. Goodrich Chemical Co.,* 474 S.W.2d 367 (Ky. 1971). As fact-finder, the ALJ has sole authority to determine the quality, character, and substance of the evidence. *Square D Co. v. Tipton,* 862 S.W.2d 308 (Ky. 1993); *Paramount Foods, Inc. v. Burkhardt,* 695 S.W.2d 418 (Ky. 1985). To reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support the decision. *Special Fund v. Francis,* 708 S.W.2d 641, 643 (Ky. 1986).

The purpose of further appellate review in this Court "is to correct the Board only where the Court believes 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." *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). Thus, the standard of appellate review is whether there is "sufficient evidence of probative value to support the finding of the Board." *Eaton Axle Corp. v. Nally*, 688 S.W.2d 334, 336 (Ky. 1985). With these standards in mind, we turn to the matter at bar.

The historical facts are undisputed and relatively simple. Reed began working for TMMK on July 1, 1994, and continued working until she sustained a compensable work-related crush injury and lengthwise laceration of her left thumb

on July 7, 2011. She has not returned to work since the injury. As the majority of the medical evidence has little to no bearing on the issues presented in this appeal, discussion of the specifics of Reed's injury and treatment shall be kept to a minimum. Reed brought a claim for benefits against TMMK as a result of her injury.

Relative to this appeal, two main issues were disputed before the ALJ and the Board—Reed's average weekly wage ("AWW") and the duration of TTD benefits. Concerning Reed's AWW, the parties stipulated

> [p]laintiff Carrie Reed was employed with [TMMK] for greater than 52 weeks prior to her injury. The parties stipulate that for all weeks prior to her injury that show $0.00 in earnings in the wage record that was filed, Ms. Reed was not working due to non-work related personal conditions. The parties also agree that other workers performing the same job as her would have earned the hourly rate listed and average a 40 hour work week.

Prior to the injury of July 7, 2011, Reed had worked only ten weeks of the prior fifty-two weeks due to treatment of unrelated medical conditions. Wage records indicate she had returned from her leave of absence less than two weeks prior to sustaining the injury, and had worked approximately sixty hours in that time. TMMK proposed calculating Reed's AWW pursuant to KRS 342.140(1)(d) while Reed contended the ALJ should instead utilize the provisions of KRS 342.140(1)(e). Under TMMK's proposal, Reed's AWW would be $524.59, while Reed calculated the figure to be $1,073.60. KRS 342.140 states in pertinent part:

> The average weekly wage of the injured employee at the time of the injury or last injurious exposure shall be determined as follows:
>
> (1) If at the time of the injury which resulted in death or disability or the last date of injurious exposure preceding death or disability from an occupational disease:
>
> . . . .
>
> (d) The wages were fixed by the day, hour, or by the output of the employee, 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;
>
> (e) *The employee had been in the employ of the employer less than thirteen (13) calendar weeks immediately preceding the injury*, his or her average weekly wage shall be computed under paragraph (d), taking the wages (not including overtime or premium pay) for that purpose to be the amount he or she would have earned had he or she been so employed by the employer the full thirteen (13) calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation[.]

(Emphasis added).

Over TMMK's objection, the ALJ determined the "unique circumstances" presented required application of KRS 342.140(1)(e) to determine Reed's AWW. Although it was undisputed Reed had been employed by TMMK

more than fifty-two weeks, her job was available for her to work during that entire period, and she was absent for non-work related health issues, the ALJ based her calculation on Reed's hourly rate at the time of the injury. Specifically, the ALJ stated, "[t]here is no question that the hourly rate of $26.40 for 40 hours per week would be the wage she would have expected to earn had the injury not occurred. For those reasons, I find [Reed's] average weekly wage to be $1,056.00 or $26.40 multiplied times 40 hours per week."

The parties disagreed regarding the duration of TTD benefits based on their differing interpretations of the medical evidence relative to the date Reed attained MMI. During the course of treatment for her work-related injury, Reed was evaluated by multiple physicians. On October 28, 2011, Dr. Ronald Burgess opined Reed had not obtained MMI and would benefit from further treatment. In a subsequent report generated approximately four months later on February 24, 2012, Dr. Burgess stated "the patient is felt to be at maximum medical improvement following crush injury to the tip of her thumb." However, Reed continued to experience issues with her thumb and additional surgery was contemplated. In an interlocutory order entered on September 7, 2012, the ALJ acknowledged the necessity and reasonableness of the proposed surgery was in doubt, and placed the claim in abeyance pending an updated report from Reed's treating physician. Dr. Frank Burke issued a report dated February 27, 2013, opining Reed had at that time reached MMI.

The ALJ—in reliance on Dr. Burke's report—determined Reed attained MMI on February 27, 2013, stating:

> I find [Reed] is entitled to TTD from July 8, 2011[,] through February 27, 2013, the date Dr. Burke found she was at MMI. It is noted that in the previous Opinion dated September 7, 2012, the undersigned found [Reed] should be allowed to continue receiving medical care and potentially undergo surgery. Therefore, it was determined she was not at MMI at least at that point in time. Therefore, I find Dr. Burke's opinion that [Reed] had reached MMI on February 27, 2013[,] the most persuasive. Accordingly, [Reed] shall be awarded TTD from July 8, 2011[,] to February 27, 2013.

TMMK's subsequent petition for reconsideration on these two issues was overruled. TMMK timely appealed the ALJ's decision.

On appeal to the Board, TMMK again challenged the ALJ's findings as to AWW and the duration of TTD benefits. TMMK contended the ALJ improperly applied KRS 342.140(1)(e) to calculate AWW based on her erroneous reading of and reliance on *Huff v. Smith Trucking*, 6 S.W.3d 819 (Ky. 1999), *C & D Bulldozing Co. v. Brock*, 820 S.W.2d 482 (Ky. 1991), and *Desa International v. Barlow*, 59 S.W.3d 872 (Ky. 2001). TMMK asserted the cited cases applied to seasonal employees or those actually employed less than thirteen weeks—facts clearly not present here. Thus, it argued the ALJ ignored the plain language of KRS 342.140 and erroneously calculated Reed's AWW using an improper "fill in the blanks" methodology by giving her credit for earnings she would have been entitled to had she actually worked the weeks she did not work and so stipulated.

Next, TMMK contended the ALJ erred in determining the duration of TTD benefits by relying on Dr. Burke's opinion as to the date Reed attained MMI and wholly rejecting the opinion of Dr. Burgess. According to TMMK, Dr. Burke did not state a date certain upon which he believed Reed had attained MMI nor did he question Dr. Burgess's earlier assessment, the absence of both of which rendered his opinion as to MMI defective and the ALJ's reliance thereon infirm. Under TMMK's theory, the ALJ was left with only Dr. Burgess's opinion as uncontradicted medical proof establishing the date of MMI and mandated a finding of MMI as of February 24, 2012.

The Board determined the ALJ erred in utilizing KRS 342.140(1)(e) as that section applied only to injured workers who had been in the employ of the employee for less than 13 weeks. In the case *sub judice*, it was stipulated Reed had been employed by TMMK in excess of 52 weeks, and Reed herself testified she had worked for TMMK for nearly 20 years. Thus, the Board held the plain language of the statute precluded application of KRS 342.140(1)(e) and required application of KRS 342.140(1)(d) to calculate the appropriate AWW. In support of its holding, the Board stated:

> [t]he AWW-1 wage for filed by [TMMK] on February 7, 2012, reflects Reed was a full-time hourly employee at the time of the injury. It provided her earnings for the four thirteen week periods comprising the 52 weeks before her injury. The first thirteen week period prior to the injury spanned the period from April 3, 2011, through June 26, 2011, during which Reed earned $1,584.00 yielding an AWW of $121.85. The record reveals Reed only worked sixty hours during that thirteen week period.

During the next two thirteen week periods, Reed had no wages. For the last thirteen week period, Reed's total earnings were $6,819.66 which yielded an AWW of $524.59. Consequently, the ALJ erred in relying upon *Huff v. Smith Trucking*, *supra*, *C & D Bulldozing Co v. Brock*, *supra*, and *Desa International v. Barlow*, *supra*. Further, the fact the case *sub judice* may have presented unique circumstances does not permit the ALJ to calculate Reed's AWW pursuant to KRS 342.140(1)(e).

In *C & D Bulldozing Co. v. Brock*, *supra*, the employee, Brock, was first employed from August 9, 1985, through August 23, 1985, and then again from September 27, 1985, through November 15, 1985. The Supreme Court noted the evidence established Brock was not employed during the weeks he received no wages. The Supreme Court determined Brock's AWW should have been calculated based on the provisions of KRS 342.140(1)(e) as the proper calculation would be based on the wages earned for the seven weeks during the thirteen week period preceding the injurious exposure.

In *Huff v. Smith Trucking*, *supra*, the situation is similar to that in *C & D Bulldozing Co v. Brock*, *supra*, as Huff had worked much less than thirteen weeks before he was injured.

Desa International v. Barlow, *supra*, involved the calculation of AWW based on Barlow's seasonal employment. Notably, in *Desa International v. Barlow*, *supra*, the Supreme Court stated as follows:

> KRS 342.140(1)(a)-(c) contain methods that are applicable to wages that are fixed by the week, month, or year. KRS 342.140(1)(e) and (f) contain special provisions that apply to workers who have worked fewer than 13 weeks or whose hourly wage cannot be ascertained. KRS 342.140(1)(d) contains a method for wages that are fixed by the day, hour or output. In instances where the worker's wages are fixed by the hour, the wages earned in each 13-week period of the

> year preceding the injury are added and then divided by 13. The average weekly wage for the period that is most favorable to the worker is used for calculating the benefit.

Id. at 873.

> Thus, pursuant to the above-language, Reed's AWW must be calculated pursuant to KRS 342.140(1)(d).
>
> Although it appears Reed may have earned greater wages had she continued to work at [TMMK], we cannot engage in such speculation. The fact remains the parties stipulated Reed had been an employee of TMMK for greater than fifty-two weeks prior to her injury. Thus, her AWW must be calculated pursuant to KRS 342.140(1)(d). Accordingly, the ALJ's determination of Reed's AWW and the award of income benefits must be vacated.

The Board further concluded the ALJ had properly calculated the duration of TTD benefits and rejected TMMK's assertion that Dr. Burke's opinion was controlling. It found no merit in TMMK's position and determined the ALJ had been presented with evidence that Reed had continuing problems with her thumb following the date Dr. Burgess indicated his belief she had attained MMI. Citing *Jackson v. General Refractories Co.*, 581 S.W.2d 10 (Ky. 1979), and *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky. 1977), the Board noted the discretion granted to an ALJ in assessing the weight and credibility of the evidence and the inferences which may be drawn therefrom, and discerned no error in the ALJ's decision to adopt Dr. Burke's opinion.

> In light of the generic statements of Drs. Burgess and Burke regarding MMI and given the nature of Reed's injuries and her treatment, the ALJ was permitted to

> conclude she did not attain MMI until February 27, 2013. Therefore, Dr. Burke's opinion comprises substantial evidence supporting the award of TTD benefits. Thus, the award of TTD benefits must be affirmed.

Reed timely petitioned for review of the Board's decision regarding her AWW. TMMK filed a cross-petition seeking review of the decision concerning the duration of TTD benefits. Following a careful review, we affirm the decision of the Board *in toto*.

As previously stated, our purpose is to correct the Board only if it has overlooked or misconstrued a controlling statute or precedent, or so flagrantly and erroneously assessed the evidence as to cause gross injustice. *Western Baptist Hospital*, 827 S.W.2d at 687-88. So long as sufficient probative evidence supports the finding of the Board, we will not disturb it on appeal. *Eaton Axle Corp.*, 688 S.W.2d at 336. We discern no error by the Board necessitating correction of the calculation of AWW and believe its decision is clearly supported by substantial evidence.

As the Board correctly deduced, when applied to the facts of this case, the plain language of the controlling statute requires application of KRS 342.140(1)(d). Reed had admittedly been in the employ of TMMK far in excess of thirteen weeks prior to her injury, thereby rendering resort to the provisions of KRS 342.140(1)(e) wholly improper. While we are sympathetic to Reed's situation and understand the compassionate reasoning behind the ALJ's decision and attempt to minimize the impact of Reed's nonwork-related illness on her

AWW, kindness and concern simply cannot change the language espoused by the General Assembly. The statute is clear, unambiguous, and must be followed. Further, Reed's impassioned plea to treat her as an employee subject to sporadic work rings hollow under the facts adduced below. The mere fact she had not actively worked a full thirteen week period during the fifty-two weeks prior to her injury—during which time it was conceded TMMK considered her an employee and would have permitted her return at any point—does not somehow transform her status to that of a seasonal or sporadic worker. Her reliance on caselaw grounded in such factual situations is inapposite. We admit the result in this case appears harsh, and would encourage the legislature to look carefully at the subject provisions and make appropriate adjustments if such unfortunate outcomes are to be avoided in the future.

Finally, we agree with the Board that the ALJ did not err in calculating the duration of TTD benefits. Even a cursory review of the record reveals Dr. Burgess opined Reed had attained MMI, while still contemplating additional surgeries to correct her ongoing discomfort. The ALJ was keenly aware of the continuing difficulties, plainly evident from reading the September 7, 2012, interlocutory order. Neither Dr. Burgess nor Dr. Burke was specific or forceful in assessing Reed's attainment of MMI. As the Board correctly noted, the ALJ—when faced with such generic medical testimony—was free to choose between the competing opinions. In our view, either doctor's view could have been considered substantial evidence supporting the ALJ's decision regarding TTD benefits and the

date of MMI. Thus, the ALJ's exercise of discretion will not be disturbed as the Board properly determined.

For the foregoing reasons, we affirm the decision of the Board to affirm in part, vacate in part and remand to the ALJ.

TAYLOR, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT/CROSS-APPELLEE, CARRIE REED:

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