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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001414-WC

MIDDLETOWN HEATING AND AIR — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-13-86565

MICHAEL K. KLIMKO;
HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING AND REMANDING

** ** ** ** **

BEFORE: COMBS, MAZE, AND STUMBO, JUDGES.

MAZE, JUDGE: Middletown Heating and Air (Middletown) petitions for review from an opinion of the Workers' Compensation Board (Board) that affirmed in part, reversed in part, and remanded an award by the Administrative Law Judge (ALJ) to Michael Klimko. Middletown argues that the ALJ clearly erred in holding that Klimko was not disqualified from receiving double income benefits

for the period following the termination of his employment. We conclude that the ALJ did not clearly err in finding that Klimko's conduct did not amount to an intentional, deliberate action with a reckless disregard of the consequences to himself or another. Therefore, the ALJ properly held that Klimko's award of permanent partial disability benefits was subject to the 2x multiplier. Hence, we affirm, and remand to the ALJ for additional findings as set forth in the Board's opinion.

On April 16, 2013, Klimko sustained an injury to his low back, accompanied by right-leg pain. At the time of his injury, Klimko was working as a Heating, Ventilation, and Cooling (HVAC) technician for Middletown. He returned to light-duty work in September of 2013, but earning the same wages and working the same number of hours. On June 19, 2014, Klimko left his employment with Middletown. Shortly thereafter, he began working for AirStream Technologies, with similar job duties but with fewer hours and less physically demanding job duties.

Ultimately, the ALJ assessed Klimko with an 11% impairment rating and awarded benefits accordingly. The ALJ also found that Klimko was entitled to a double income benefit from September 20, 2013, through March 20, 2014, and from June 20, 2014, forward. On appeal, the Board found that the ALJ erred by awarding double income benefits for the former period because Klimko returned to work at an equal or greater average weekly wage than he earned prior to his injury. However, the Board found that the ALJ properly awarded double income benefits

for the period after June 19, 2014, because Klimko's actions did not amount to an "intentional, deliberate action with a reckless disregard of the consequences either to himself or to another." Finally, the Board remanded the matter to the ALJ with directions to award permanent partial disability benefits on the date of injury, but suspended for any period that temporary total disability benefits were paid. Middletown now petitions for review of this decision.

The sole question on review is whether Klimko's income benefits should be enhanced by the 2x multiplier of KRS[1] 342.730(1)(c)2. That statute permits a double income benefit for any period that employment at the same or a greater wage ceases "for any reason, with or without cause." Prior to 2015, the Kentucky Supreme Court interpreted KRS 342.730(1)(c)2 as permitting a double income benefit during any period that employment at the same or a greater wage ceases "for any reason, with or without cause," provided that the reason be related to the disabling injury. *Chrysalis House, Inc. v. Tackett*, 283 S.W.3d 671, 674 (Ky. 2009).

However, the Court recently revisited this holding in *Livingood v. Transfreight, LLC*, 467 S.W.3d 249 (Ky. 2015). In *Livingood*, the employee returned to work at the same wages, but was subsequently terminated when a forklift that he was operating accidentally bumped into a pole. Based on *Chrysalis House*, the ALJ denied the double income benefit, noting that the employee was terminated for reasons unrelated to his injury. On subsequent review, the Supreme

[1] Kentucky Revised Statutes.

Court concluded that its prior interpretation of the statute in *Chrysalis House* misinterpreted the legislature's intent.

The Court first noted that the purpose of KRS 342.730(1)(c)2 is to keep partially disabled workers in the habit of working and earning as much as they are able. "It creates an incentive for them to return to work at which they will earn the same or a greater average weekly wage by permitting them to receive a basic benefit in addition to their wage but assuring them of a double benefit if the attempt proves to be unsuccessful." *Id.* at 256 (citing *Toy v. Coca Cola Enters.*, 274 S.W.3d 433, 434-35 (Ky. 2008)). The Court went on to point out that the statute also discourages an employer from continuing to employ an injured worker at the same or a greater wage for the sole purpose of securing a finding of partial rather than total disability or a finding under KRS 342.730(1)(c)2 rather than a triple benefit under KRS 342.730(1)(c)1. *Id.* (citing *Chrysalis House*, 283 S.W.2d at 675). Based on this legislative intent, the Court overruled *Chrysalis House* to the extent that it interpreted the statute to require that the cessation of employment at the same or greater wage must relate to the disabling injury.

Nevertheless, the Court held a literal construction of KRS 342.730(1)(c)2 would allow an employee, such as the one in *Chrysalis House*, to benefit from his own wrongdoing. Similarly, the Court noted that such a result would be inconsistent with other provisions of KRS Chapter 342, which evince a legislative intent that an employee should not benefit from his own wrongdoing. *Id.* at 258. Therefore, the Court concluded that KRS 342.730(1)(c)2 permits a

double income benefit during any period that employment at the same or a greater wage ceases "for any reason, with or without cause," except where the reason for the reduction in income is shown to be the employee's intentional, deliberate action with a reckless disregard of the consequences either to himself or to another. *Id.*

In *Livingood*, the Court found that the employee's conduct, which was at most negligent, did not rise to this level. However, the Court noted that the employee's conduct in *Chrysalis House*, which involved theft, would meet this standard. *Id.*

In the current case, Klimko left his employment with Middletown following an incident that occurred on June 19, 2014. While servicing an air conditioner at a customer's house, Klimko found that the coil was leaking refrigerant. He called his manager to get a price on a replacement coil. During that call, he had a disagreement with his manager about Middletown's down-payment policies. The argument became heated, and Klimko told his manager that he was quitting. The manager asked Klimko to return to the office to discuss the matter, but Klimko again stated that he was going home. The customer called Middletown later to say that she had asked Klimko to leave because of his behavior. Middletown had to send another HVAC technician to the house because the customer's air conditioner was not functioning. Middletown retrieved Klimko's work truck later that day, and he returned his tools the following day.

Middletown argues that Klimko's misconduct precludes application of the 2x multiplier. The ALJ disagreed, stating:

> The ALJ does not view Plaintiff's resignation as an intentional, deliberate action with reckless disregard of the consequences to himself or another. In this case, substantial evidence does not establish Plaintiff's conduct was of that nature. Plaintiff resigned his position with the Defendant on June 19, 2014. Plaintiff resigned out of frustration on June 19, 2014. He voluntarily quit and returned the Defendant's equipment[.] Because Plaintiff stopped earning a same or greater wage, he is entitled to the 2x multiplier during this period.

Middletown takes issue with this conclusion, pointing out that Klimko deliberately quit in the middle of a job. Klimko's actions damaged Middletown's relationship with its customer and forced it to send out another HVAC technician to complete the work. Middletown also had to retrieve Klimko's work truck and equipment. Middletown argues that the ALJ clearly erred in finding that Klimko's conduct did not amount to an intentional, deliberate action with reckless disregard of the consequences to himself or another.

The Board conceded that Klimko's behavior was "reprehensible." But the Board also noted that the ALJ, as fact-finder, has the sole discretion to determine the quality, character, and substance of the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). Since Klimko, the party with the burden of proof before the ALJ, was successful, the question on appeal to the Board was whether the ALJ's finding was supported by substantial evidence. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). The Board concluded

that there was substantial evidence to support the ALJ's finding that Klimko's behavior on June 19, 2014, did not meet the standard for "intentional, deliberate action" set out in *Livingood*.

The function of this Court's review of the Board is to correct the Board only where the Court perceives that 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 Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). We conclude that the ALJ and the Board correctly applied *Livingood* to the facts of this case. In *Livingood*, the Court found that the 2x multiplier applies even if the employee is terminated for good cause. *Livingood*, 467 S.W.3d at 257. But the Court also noted the strong statutory and public policy against rewarding an employee for his own misconduct. In order to balance these competing interests, the Court adopted the "intentional, deliberate action" standard. The Supreme Court later noted that this is a high standard, and basic bad behavior will not bar application of the 2x multiplier. *Fuertes v. Ford Motor Co.*, 481 S.W.3d 808, 810 (Ky. 2016).

Here, the ALJ found that Klimko merely resigned out of frustration, and not with any subjective intention to deliberately disregard the consequences of his action. Klimko's conduct was clearly unacceptable and would have been grounds for termination if he had not resigned first. Furthermore, the ALJ would have been within her discretion to find that it amounted to "intentional, deliberate action with reckless disregard of the consequences to himself or another."

However, we agree with the Board that there was substantial evidence to support that ALJ's conclusion to the contrary. Therefore, the ALJ did not clearly err in finding that Klimko remained eligible for the double income benefit.

Accordingly, we affirm the August 26, 2016 opinion and order of the Board insofar as it held that that the ALJ did not clearly err in holding that Klimko remained eligible for double income benefits after June 19, 2014. We remand this matter to the ALJ for further proceedings in accord with the Board's order.

ALL CONCUR.

BRIEF FOR APPELLANT:

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