RENDERED: DECEMBER 7, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001459-WC

LEXINGTON FAYETTE URBAN COUNTY GOVERNMENT — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-15-99086

JOHN BAKER;
HONORABLE GRANT ROARK,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, D. LAMBERT, AND J. LAMBERT, JUDGES.

LAMBERT, D., JUDGE: The Lexington-Fayette Urban County Government (hereinafter "the employer") petitions this Court for review of a decision of the Workers' Compensation Board ("WCB") which affirmed the award of benefits to former employee, John Baker. The employer asserts challenges to findings of the

Administrative Law Judge ("ALJ") regarding the causation and work-relatedness of Baker's injuries, as well as to the constitutionality of the regulatory scheme under which Baker received temporary benefits. Having reviewed the record and finding substantial evidence in support of the ALJ's findings and no constitutional violations, we hereby affirm the WCB's opinion.

I. FACTUAL AND PROCEDURAL HISTORY

Baker worked for the employer as a heavy equipment operator. His duties included operating forklifts, bobcats, yard dogs, and front-end loaders. He also bore the responsibility of maintaining these pieces of equipment, which required the use of hand tools. He would occasionally use a computer to weigh trucks. His job duties also required him to lift weights ranging from twenty to one hundred pounds on a daily basis.

Deposition testimony established that in 2010, Baker began experiencing symptoms later diagnosed as carpal tunnel syndrome ("CTS") in his right hand. He saw Dr. Greg Wheeler, who diagnosed him. Dr. John Gilbert performed surgery for the release of his right carpal tunnel on May 5, 2010. Per medical records, Baker received a diagnosis of hypothyroidism in late 2013. Baker was also morbidly obese, weighing approximately 350 pounds at his peak, which had been reduced to approximately 280 pounds at the time of the hearing in 2016.

In 2014, Baker again saw Dr. Gilbert for similar symptoms in his left hand. Baker continued to work during this time, while undergoing non-surgical treatment. Eventually Baker required surgery to release his left carpal tunnel as well. That surgery occurred in 2016, during the pendency of this claim for benefits. Baker also underwent several independent medical evaluations ("IME").

Orthopedic surgeon, Dr. Richard Burgess, performed one such IME. Dr. Burgess opined that Baker's CTS was caused entirely by his obesity and his hypothyroidism (both of which predisposed him to develop CTS), and not by his work activities. Dr. Burgess specifically discounted Baker's claims that his injuries were work-related because his work activities were not forceful or repetitive enough to be causally related to his CTS.

Another orthopedic surgeon, Dr. James Owen, evaluated Baker and reached the opposite conclusion as Burgess. Dr. Owen concluded that Baker's work duties, which included "repetitive pinching, gripping, and fine and gross manipulation," caused his CTS. Dr. Owen assigned Baker a 13% whole person impairment ("WPI") rating.

Relying on Dr. Owen's IME, the ALJ granted Baker temporary total disability ("TTD") benefits in an interlocutory order on October 26, 2015. The ALJ took judicial notice of the fact that the equipment Baker operated vibrates during operation. The ALJ also provided reasoning for finding Dr. Owen more

credible than Dr. Burgess, that Dr. Burgess ignored the fact that Baker's duties involved repetitive tasks performed using vibratory equipment.

The employer moved to reconsider its award, which the ALJ denied, and Baker underwent surgery to release his left carpal tunnel.

In the interim between the denial of employer's motion to reconsider and the final award, Baker underwent a third IME, performed by Dr. Richard Dubou. Dr. Dubou concluded that Baker's CTS resulted from his obesity and hypothyroidism. Dr. Dubou also offered, as part of his medical evaluation, that operation of bulldozers and similar heavy equipment do not normally cause CTS.

The ALJ, once again relying on the report prepared by Dr. Owen, issued a final opinion awarding Baker permanent partial disability benefits on January 6, 2017. The employer again moved to reconsider, alleging the ALJ based the award on an improper taking of judicial notice. The ALJ denied the motion, noting that judicial notice is appropriate when a fact is not subject to reasonable dispute and is generally known by the community of the county of jurisdiction. The WCB affirmed the award on appeal.

Having exhausted all administrative remedies, the employer filed the instant petition. The employer asserted three evidentiary issues and one constitutional error.

II. ANALYSIS

A. STANDARD OF REVIEW

The purpose of judicial review of a decision of the WCB is only to correct a misapplication of controlling law or to correct errors so flagrant as to work a gross injustice against the non-prevailing party. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685 (Ky. 1992). When a workers' compensation claimant prevails before the ALJ, the question for a reviewing court is whether substantial evidence supports the award. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). Evidence is substantial when it would induce a reasonable person to vote to convict. *Smyzer v. B.F. Goodrich Chem. Co.*, 474 S.W.2d 367 (Ky. 1971).

B. THE ALJ PROPERLY TOOK JUDICIAL NOTICE

The employer argues that the ALJ improperly took judicial notice of the fact that the equipment Baker ran caused vibrations when in operation.

Rule 201(b) of the Kentucky Rules of Evidence ("KRE") permits judges to take notice of facts which are not subject to reasonable dispute and generally known in the county in which venue is fixed. KRE 201(b)(2).

The employer asserts that the noticed fact is not commonly known in the county, because only a small segment of the population have experience operating these types of machinery. The ALJ, in its opinion denying the

employer's motion to reconsider the interlocutory award, addressed the issue thusly:

> The ALJ believes that the fact that operating heavy equipment requires gripping of controls which vibrate while in use is generally known among the population of central Kentucky and/or Franklin or Fayette Counties. This is a fact known to this ALJ, and not simply as a result of having grown up in the construction industry and around heavy equipment, but as any ordinary person who has operated even the smallest of equipment such as riding lawnmowers, which is something with which most everyone in the general population has experience.

The WCB affirmed the ALJ's use of judicial notice, finding the ALJ adequately justified such finding. We agree. The employer's contention, that only individuals who have actually operated the specific machines that Baker used on a daily basis can have knowledge of whether they generate vibrations, is overly specific. Moreover, the employer's reliance on *Commonwealth v. Howlett*, 328 S.W.3d 191 (Ky. 2010), to stand for the proposition that judicial notice is inappropriately based on a judge's personal experience, ignores the ALJ's discussion of the related common experience of operating a riding lawnmower.

We conclude that the ALJ sufficiently justified its taking of judicial notice of a relevant fact, and find no error in the WCB's affirming that taking of notice.

C. EVEN IF JUDICIAL NOTICE HAD BEEN IMPROPERLY TAKEN, THE ALJ BASED THE AWARD ON MEDICAL OPINION RELATING TO CAUSATION

The employer contends that the record contains no medical opinion establishing causation, and for that reason the award should be vacated. The argument hinges on the fact that Dr. Owen's opinion does not specifically mention mechanical vibration as playing a causative role.

This position ignores the fact that Dr. Owen's opinion explicitly linked the gripping, pinching, and manipulation, of the hand controls of the heavy machinery to his CTS, without mentioning vibration. Not only does the employer overstate the importance of the judicial notice taken by the ALJ, it also dismisses the fact that the ALJ relied on an opinion of a qualified medical expert. As the WCB noted: "No additional facts were necessary to bridge the gap between Dr. Owen's medical opinion and Baker's work."

KRS 342.285(1) vests the ALJ with the sole authority to make findings of fact. The ALJ thus holds "sole discretion to determine the quality, character, weight, credibility, and substance of the evidence, and to draw reasonable inferences from the evidence." *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky. App. 2009). This authority extends the ALJ the right to believe or disbelieve all or parts of the evidence presented for review. *Caudill v.*

Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Our review does not concern weighing the evidence. Rather, we examine the application of the law to the facts, and where the ALJ correctly applies the law, our power to disrupt the ruling is limited to circumstances where that ruling lacks substantial supporting evidence. *Kentucky Unemployment Ins. Comm'n v. Cecil*, 381 S.W.3d 238 (Ky. 2012).

Dr. Owen's medical opinion, despite the employer's argument as to the weight the ALJ should have given it, does constitute substantial evidence. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). The ALJ thus committed no error in making the award, nor did the WCB in affirming it.

D. THE INTERLOCUTORY AWARD DID NOT VIOLATE THE EMPLOYER'S DUE PROCESS RIGHTS

The employer urges this Court to revisit the constitutionality of the legal authority of the ALJ to issue the interlocutory award. To be more precise, the employer argues that it was deprived of its due process rights by the interlocutory order directing it to provide benefits to Baker (including paying for the surgery on Baker's left hand) which it could not appeal by virtue of its interlocutory nature. The employer generally asserts the same arguments as those advanced by the employer in *Homestead Nursing Home v. Parker*, 86 S.W.3d 424 (Ky. App. 1999):

> Homestead argues that its right to appeal immediately from the award of TTD and medical benefits should be

> inferred from the fact that, otherwise, its undisputed right to appeal will be rendered essentially meaningless. Once paid, Homestead maintains, these benefits are unlikely to be recovered. The "right" to seek recovery on appeal, therefore, is really no right at all.

Id. at 427. This Court noted in *Homestead* that "[a]side from the constitutional issues, however, this argument was rejected in *Ramada Inn v. Thomas*, [892 S.W.2d 593 (Ky. 1995)] and *Transit Authority of River City v. Saling*, [774 S.W.2d 468 (Ky. App. 1989)]." *Id.* Ultimately, however, Homestead had failed to preserve its right to challenge the constitutionality of the statutory and regulatory scheme, and this Court declined to undertake the analysis.

Unlike the employer in *Homestead*, the employer here served the Office of the Attorney General of Kentucky with a copy of its Notice of Appeal to the WCB, thereby giving notice of its challenge to the constitutionality of KRS 342.275, 803 KAR 25:010(12) and 803 KAR 25:010(21), before the WCB. The WCB correctly refrained from ruling on the issue, as an examination of the constitutionality of statutory provisions is outside the scope of its statutory mandate. *Scott v. AEP Kentucky Coals, LLC*, 196 S.W.3d 24, 26 (Ky. App. 2006) ("Administrative agencies cannot decide constitutional issues."); KRS 342.285(2). The employer also served a copy of its brief to this Court on the Attorney General's Office, thereby providing notice and preserving the issue for our review.

The employer in *Fruit of the Loom v. Ooten*, 70 S.W.3d 403 (Ky. 2002), offered a similar due process argument, and the Kentucky Supreme Court affirmed this Court's dismissal of the appeal. In *Ooten*, the employee suffered an undisputedly work-related elbow injury, for which the employer voluntarily paid TTD benefits. Two years later, the employee returned to work, but shortly thereafter began suffering symptoms in the same elbow. The employee's physician determined she needed another surgery, but the employer's two medical experts opined the symptoms were not work-related. The arbitrator reviewing the case determined the symptoms were work-related and entered an interlocutory order directing payment of TTD benefits until the employee reached maximum medical improvement.

The constitutional issue before the Court was whether the employer had been deprived of property without a formal hearing and cross-examination. Our Supreme Court noted that 803 KAR 25:010 § 12(3) required the party requesting interlocutory relief to demonstrate that irreparable injury, loss or damage will occur during the pendency of the proceedings before the final decision could be made. *Id.* at 405. The Court also noted that a *de novo* review conducted in any theoretical appeal would also require the very same proof. The Court further noted that 803 KAR 25:010 §12(4)[1] "permits an ALJ to 'require periodic

[1] The same language is now found in 803 KAR 25:010 §12(2)(f).

reports as to the physical condition of the of the plaintiff' and provides that 'upon motion and a showing of cause'" the ALJ could terminate the benefits. *Id.* at 405. The Court was "persuaded that the language of this regulation is broad enough to afford the employer the relief that it sought[,]" and affirmed this Court's dismissal of the appeal as moot. *Id.*

Though the specific nature of the due process violation differs here, the Supreme Court's reasoning in *Ooten* remains applicable. Because a procedural avenue exists by which the employer could seek early termination of the TTD benefits, we cannot conclude the regulatory scheme presents a due process violation.

III. CONCLUSION

Having reviewed the record, we cannot conclude that the WCB erred in affirming the ALJ's award of benefits to Baker. The ALJ did not improperly take judicial notice, and the ruling was supported by substantial medical evidence. The ruling of the WCB is consequently affirmed.

ALL CONCUR.

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