

RENDERED: FEBRUARY 1, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000818-WC

RUSSELL WATTERS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-17-00296

KENTUCKY TRANSPORTATION CABINET;
HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

CLAYTON, CHIEF JUDGE: Russell Watters petitions for review of a Workers' Compensation Board ("Board") opinion affirming in part, reversing in part, and remanding the opinion and order of the Administrative Law Judge ("ALJ") awarding Watters benefits enhanced by the three multiplier under Kentucky

Revised Statutes (KRS) 342.730(1)(c)1. The Board reversed the ALJ's application of the three multiplier. Having reviewed the record, we affirm.

BACKGROUND

The underlying facts of Watters's case were set forth by the Board in its May 4, 2018 opinion:

Watters worked for [the Kentucky Transportation Cabinet ("KTC")] on September 1, 2013 as a heavy equipment operator. He has a high school education, a commercial driver's license ("CDL"), and firefighting certifications. His employment history includes sewing sleeping bags, landscaping and mowing, operating a forklift, and working as a volunteer firefighter. On August 4, 2016, Watters was working on a lawn mower at KTC when a pry bar he was using slipped and hit him in the head, causing him to fall. His back and head hit the concrete floor of the shop. Watters received stitches for his head injury and returned to his normal duties the next day.

However, over the following weeks, he experienced painful headaches and vision problems. After visiting urgent care facilities, he eventually sought treatment at UK Healthcare on September 3, 2016. An MRI on September 3, 2016 revealed extensive bilateral dural venous thrombosis with no seizure activity. A CT scan indicated extensive dual sinus thrombosis. Watters was admitted and treated with anticoagulants.

Dr. Jessica Lee of UK Neuroscience Institute examined Watters at an October 1, 2016 follow-up visit. She diagnosed cerebral venous sinus thrombosis with a history of traumatic brain injury.

.....

At the final hearing held on September 18, 2017, Watters testified Dr. Lee released him to regular duty with no restrictions on January 12, 2017, though Dr. Lee's medical record for this date was not entered into evidence. He was placed on light duty until March 1, 2017.

By the time of the final hearing, . . . Watters had returned to full duty for about one month. He stated he returned to work doing "exactly" the same job as he was performing pre-injury. Counsel asked Watters, "if your medical condition continues as it is today, do you think you will be able to maintain your employment for the foreseeable future." Watters replied that he would.

.....

Drs. Stephen Autry and Joseph Zerga conducted independent medical evaluations ("IME") and offered opinions that are pertinent to the issues on appeal. Dr. Autry examined Watters on April 12, 2017 and diagnosed traumatic closed head injury with subsequent cerebral venous thrombosis. He concluded Watters' head injury was caused by the work accident, and placed him at maximum medical improvement as of the examination date. Dr. Autry assigned a 7% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition.

Dr. Autry indicated Watters suffers from residual headaches and anxiety post-injury. Later in his report, he indicated Watters "lacks the physical capacity to return to work in the type of employment and job description performed at the time they ceased working." He offered no discussion regarding what physical limitations would prevent a return to work. However, in responding to the next question, Dr. Autry noted Watters "has returned to full work activities

without restriction. No restrictions in terms of activity at this time would be deemed necessary.”

Dr. Joseph Zerga conducted an IME on April 19, 2017. He stated Watters had a superior sinus thrombosis, possibly with a seizure, which he attributed to the work injury. Dr. Zerga described Watters’ current condition as normal and noted, “He has no clinical objective findings. He is asymptomatic.” He placed Watters at maximum medical improvement with no permanent impairment. Dr. Zerga noted the seizure diagnosis restricted Watters from commercial driving until August 2017, but recommended no further treatment or restrictions.

Upon consideration of the evidence, the ALJ was ultimately convinced Watters’ condition is work-related. He relied upon the impairment rating assessed by Dr. Autry, as well as his opinion Watters does not retain the physical capacity to return to his pre-injury employment. As such, the ALJ enhanced the award of [permanent partial disability (“PPD”)] benefits by the three multiplier. KRS 342.730 (1)(c)1. The ALJ did not offer any analysis of the fact Watters had already returned to work without restrictions.

Thereafter, KTC filed a petition for reconsideration of the ALJ’s opinion, arguing that the inconsistencies between Dr. Autry’s report and the fact that Watters had already returned to work with no restrictions mandated the ALJ’s additional review. The ALJ denied the motion, stating he was “persuaded by the credibility of Dr. Autry” and that, while Dr. Autry “declined to issue more specific restrictions, he still believed that [Watters] did not retain the physical capacity to perform his prior job on an indefinite basis.”

KTC subsequently appealed the ALJ's decision to the Board, again arguing that the ALJ had mistakenly enhanced Watters' award by the three multiplier. The Board affirmed the ALJ's opinion in part but reversed the portion of the ALJ's determination that Watters was entitled to benefits enhanced by the three multiplier. The Board found that Dr. Autry's opinion only went to whether Watters retained the physical capacity to perform his job on an indefinite basis, which was not a consideration under the statute. Moreover, the Board found that no other substantial evidence in the record supported the conclusion that Watters lacked the current capacity to return to his pre-injury work. However, the Board did allow Watters benefits enhanced by the two multiplier pursuant to KRS 342.730(1)(c)2, as it found that both parties had stipulated that Watters was entitled to such enhancement. This appeal followed.

ANALYSIS

The Board's review is limited to determining whether the evidence was sufficient to support the ALJ's findings, or if the evidence compelled a different result. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992). "The ALJ, as the finder of fact, and not the reviewing court, has the sole authority to determine the quality, character, and substance of the evidence." *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993) (citing *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985)). Further, the function of this Court when

reviewing the Board's decision is to correct the Board where the Court perceives 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." *Kelly*, 827 S.W.2d at 687-88.

On appeal, Watters' sole claim of error is that the Board improperly substituted its evaluation of the evidence regarding the three multiplier under KRS 342.730(1)(c)1 for that of the fact-finder, *i.e.*, the ALJ. Under KRS 342.730(1)(c)1, an award of benefits shall be multiplied by three if a claimant can prove that "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 the injury." The ALJ based his determination that the foregoing standard had been met based on Dr. Autry's opinion that Watters lacked the physical capacity to return to his pre-injury job. However, as previously discussed, Dr. Autry also noted in his opinion that Watters had already returned to that same work under no restrictions. The ALJ dealt with the apparent incompatibility of these two opinions by finding that Dr. Autry was indicating his belief that Watters "does not retain the physical capacity to perform his job *on an indefinite basis*." (Emphasis added.)

However, we agree with the Board that KRS 342.730(1)(c)1 does not necessitate an inquiry as to whether Watters would be able to execute his job on an indefinite basis. Rather, in resolving whether the three multiplier is applicable

under the statute, the pertinent query is solely whether the claimant “retain[s] the physical capacity to return to the type of work that the employee performed at the time of injury[.]” KRS 342.730(1)(c)1; *see also Middleton v. Lowe’s Home Centers, Inc.*, 2015-SC-000120-WC, 2015 WL 6591847 (Ky. Oct. 29, 2015)¹ (“[T]he uncontradicted evidence is that Middleton . . . performs the exact same tasks that she did before her work-related injury. Middleton . . . admits that she can complete them at this time. Thus, the Court of Appeals was correct in holding that KRS 342.730(1)(c)1 does not apply.”). Here, the evidence clearly showed that, as of the date of the award, Watters had returned to his pre-injury work. Watters testified that he performed “exactly” the same work upon his return with no accommodations and making a higher hourly rate than at the time of his injury. He further testified that he would be able to maintain his employment for the foreseeable future.

The Board correctly reviewed the proof in this claim to determine whether the ALJ’s decision was supported by substantial evidence and did not err in determining that the ALJ’s reliance upon and interpretation of Dr. Autry’s opinion could not be considered substantial evidence relevant to a determination under KRS 342.730(1)(c)1. We can find no other evidence in the record to buttress the contention that Watters lacked the current capacity to return to his pre-

¹ This case is cited pursuant to Kentucky Rules of Civil Procedure (CR) 76.28(4)(c).

injury work, especially in light of the fact that he was already performing his pre-injury duties without accommodations at the time of the award. For the foregoing reasons, we cannot say that the Board “committed an error in assessing the evidence so flagrant as to cause gross injustice.” *Kelly*, 827 S.W.2d at 687-88. Therefore, we affirm the Board’s opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

McKinnley Morgan
London, Kentucky

BRIEF FOR APPELLEE:

Cate A. Poole
Lexington, Kentucky