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RENDERED: MARCH 21, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000790-WC

COMMONWEALTH OF KENTUCKY,
UNINSURED EMPLOYERS' FUND — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2011-CA-000493-WC
WORKERS' COMPENSATION NO. 09-01019

MICHELE LYNN TURNER;
LEE WARNER,
D/B/A FLIP CITY GYMNASTICS ACADEMY;
ASHLEY STRATTON,
D/B/A FLIP CITY GYMNASTICS ACADEMY;
HONORABLE R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, the Commonwealth of Kentucky, Uninsured Employers' Fund, ("UEF") appeals from a decision of the Court of Appeals which affirmed a workers' compensation award in favor of Appellee, Michele Lynn Turner. The UEF concedes that Turner is entitled to workers' compensation benefits, but argues that the amount of her award was miscalculated because it was based in part on wages from a job unaffected by her injury. The UEF also argues that the Administrative Law Judge ("ALJ") should have relied on Turner's W-2 forms

to calculate her average weekly wage instead of basing it on her testimony. For the reasons set forth below, we affirm the Court of Appeals.

Turner suffered a neck and spinal injury[1] while working as a coach and gymnastics instructor for Flip City Gymnastics Academy. Flip City did not carry workers' compensation insurance. As a result of her injury, Turner is unable to perform certain "hands-on" aspects of her coaching job, such as spotting gymnasts, and is limited to lifting items no greater than twenty to twenty-five pounds. Prior to the injury, Turner testified that she worked eighteen hours a week at Flip City at a salary of ten dollars per hour. However, after the injury Turner could only work approximately eight hours a week for Flip City and her job responsibilities were reduced.

While working at Flip City, Turner held concurrent employment as a substitute teacher's assistant for the Jefferson County Public Schools ("JCPS"). It is undisputed that Turner's supervisors at Flip City knew about her job with JCPS. Turner worked a maximum of thirty-two and a half hours a week during the school year for JCPS at a rate of $8.73 per hour. The injury Turner suffered at Flip City did not impact her ability to perform her job with JCPS, outside of the two weeks of work she missed while recovering from her injury. After recovering from her neck injury, Turner was made a permanent employee of JCPS and received a raise to $11.31 per hour.

[1] As a result of her injury, Turner had to undergo a cervical fusion of her neck at the C4-C5 level.

The ALJ awarded Turner benefits for her temporary total disability and for her 28.75% permanent partial disability. The ALJ calculated the permanent partial disability by determining her average weekly wage based on working eighteen hours at Flip City and her concurrent employment with JCPS. Pursuant to KRS 342.730(1)(c)(1), the ALJ used a multiplier of three on her combined average weekly wage for a total permanent partial disability benefit of $266.64 per week for 425 weeks.

On appeal, both the Workers' Compensation Board and Court of Appeals affirmed the ALJ's decision. The UEF now appeals to this Court.

I. THE ALJ CORRECTLY CALCULATED TURNER'S AVERAGE WEEKLY WAGE BY INCLUDING WAGES FROM HER CONCURRENT EMPLOYER

The UEF's first argument is that the ALJ erred by including the wages Turner earned from her concurrent employer, JCPS, into the calculation of her average weekly wage. The UEF contends that since Turner's ability to work for JCPS was not affected or impaired by her injury at Flip City, by including those wages in the average weekly wage calculation, it provides her an inappropriate windfall. This is especially true, the UEF argues, since after her injury Turner received a raise from JCPS.

The law and record in this matter does not support the UEF's position. KRS 342.140 states in pertinent part:

> Computation of employee's average weekly wage. The average weekly wage of the injured employee at the time of the injury or last injurious exposure shall be determined as follows: . . .
> (5) When the employee is working under concurrent contracts with two (2) or more employers and the defendant employer has knowledge of the employment prior to the injury, his or her wages

> from all the employers shall be considered as if earned from the employer liable for compensation.

Since it is undisputed that Turner's supervisor at Flip City knew of her concurrent employment with JCPS, the plain language of KRS 342.140(5) requires the wages from JCPS to be included in the average weekly wage calculation. The ALJ did not err in determining Turner's average weekly wage.

The UEF contends that *Double L Const., Inc. v. Mitchell*, 182 S.W.3d 509 (Ky. 2005) provides authority by which one can avoid the application of KRS 342.140(5) if the worker's ability to perform their job with a concurrent employer is unaffected by the injury. However, *Double L* involves the calculation of temporary total disability benefits, not permanent partial disability benefits which is the subject matter of this case. On the subject of determining permanent partial disabilities, *Double L* clearly states that: "an injury that causes a permanent disability regarding the job in which it occurred necessarily causes a permanent disability regarding a concurrent job as well. KRS 342.140(5) takes this into account by compensating a worker for a reduction in the ability to perform both the job in which the injury occurred and a concurrent job." *Id.* at 514.

While Turner did receive a pay raise and a full-time year-round job from JCPS after her injury, it cannot be said that the injury did not affect her ability to work. Turner testified that she still feels neck pain and discomfort due to her injury and is having difficulty sleeping. Due to the neck pain, she must take breaks from her job at JCPS. Accordingly, we find that Turner's job

performance at JCPS was affected by the Flip City injury and the ALJ correctly included Turner's wages from JCPS as part of the average weekly wage calculation.

II. THE ALJ PROPERLY APPLIED THE THREE MULTIPLIER TO TURNER'S AWARD

The UEF next argues that the ALJ erred by applying the three multiplier contained in KRS 342.730 to Turner's workers' compensation benefits. The UEF again contends that since Turner's ability to work at her concurrent job with JCPS was not permanently impeded by her Flip City injury, and that she actually received a raise at that job, it is unfair that the triple multiplier be applied to those wages. KRS 342.730(1)(c) states:

> 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 the injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined . . .

In this matter it is undisputed that Turner cannot return to the type of work she performed at the time of her injury – serving as a gymnastics coach with the requirement that she be able to assist and lift children as they perform their exercises. Turner is now restricted to lifting no more than twenty-five pounds and cannot physically perform the job. Therefore, the ALJ properly applied the three multiplier provided in KRS 342.730 to Turner's benefits.

The UEF cites to the case of *Lowe's No. 0507 v. Greathouse*, 182 S.W.3d 524 (Ky. 2006) as support for the position that the three multiplier should not be applied. In *Greathouse*, the injured worker maintained concurrent employment with a lumber yard and a printing company. The worker was

injured while working at the lumber yard. The injury he suffered did not prevent him from continuing to work at the lumber yard, but caused him a disability which prevented his continued employment with the printing company. This Court stated, "KRS 342.730(1)(c)(1) provides a triple benefit for a loss of the physical capacity to perform 'the type of work that the employee performed at the time of injury.' It does not refer to the capacity to perform other types of work." *Id.* at 527. Since the worker's injury at the lumber yard did not affect his ability to continue working there, but instead affected his "capacity to perform other types of work" the three multiplier was not applied to his wages.

This matter provides a different factual situation from *Greathouse*. Here Turner's injury does prevent her from performing the type of work she performed at the actual time she was hurt, working as a gymnastics coach. Thus, despite the UEF's argument to the contrary, *Greathouse* is not controlling and the ALJ did not err by applying the three multiplier to Turner's benefits.

III. THE ALJ DID NOT ERR BY AVERAGING TURNER'S JCPS WAGES OVER NINE MONTHS INSTEAD OF A FULL YEAR

The UEF's next argument is that if Turner's salary from JCPS is included in her average weekly wage, it would have to be averaged over the entire year, instead of the nine months she actually worked. The UEF contends that since Turner only worked during the school year, it is inequitable for her to receive full benefits for the summer vacation months. However, we disagree. KRS 342.140 provides in pertinent part:

> (1) If at the time of the injury which resulted in . . . disability:
> (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, or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the injury[.]

Since Turner was paid hourly by JCPS, the ALJ correctly applied KRS 342.140 to determine her average weekly wage. The UEF provides no persuasive authority as to why this statute should not be applied and there is no error here.

IV. THE ALJ DID NOT ABUSE ITS DISCRETION BY ACCEPTING TURNER'S TESTIMONY REGARDING HER WAGES

Finally, the UEF argues that the ALJ abused his discretion by basing his determination of Turner's average weekly wage on her testimony about how many hours she worked per week and not on W-2 forms provided by her employers. While it is true that forms generated by an employer are considered the most reliable and highest form of evidence, *Elkhorn Coal Co. v. Stout*, 293 Ky. 51, 168 S.W.2d 332 (1943), an ALJ has broad discretion to determine what evidence he relies upon and finds persuasive. *See Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). In this matter, the only actual evidence regarding how many hours per week Turner worked came from her testimony. The W-2 forms in question only provided her total yearly wages and not a breakdown of her weekly wages. As such, we cannot find that the ALJ abused his discretion by relying on Turner's testimony instead of the W-2 forms. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985) (holding

that an ALJ has the sole discretion to determine the quality, character, and substance of the evidence).

CONCLUSION

For the reasons set forth above, we affirm the decision of the Court of Appeals.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. All concur.

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