

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000341-WC

MONROE PALLET

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-88253

DEXTER DICK; HONORABLE THOMAS
DAVIS, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, HOWARD, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Monroe Pallet appeals from the affirmation by the Workers' Compensation Board of the Administrative Law Judge's finding that the 3.0 multiplier established by KRS 342.730(1), applies to the claim made by its employee, Dexter Dick. For the reasons set forth herein, we affirm.

Dexter Dick experienced a work injury on March 17, 2005, whereby he sustained a partial amputation to the middle and index fingers of his right hand. There is no dispute that the injury occurred and that it was work-related.

Dick and his wife, Bonnie, who also works for Monroe, testified that they have informally switched jobs following the injury because it is easier for Dick to do Bonnie's slower-paced work. Monroe, however, argues that Dick is performing all his pre-injury tasks to their satisfaction.

Additionally, Dick originally stated that he was making \$7.50 per hour pre-injury and that he was still making this amount post-injury. At the hearing, however, Dick presented a payroll report that represented he made \$15.98 less per week post-injury.

The ALJ also considered three physicians' reports in making his determination. First, Dr. William O'Neill, Jr., one of Dick's treating physicians, assigned no permanent work restrictions following the injury. Second, Monroe's hired medical expert, Dr. Michael Best, also opined that Dick could return to full and unrestricted work activities. Finally, however, Dr. Anthony J. McEldowney, hired by Dick, determined that Dick should avoid repetitive lifting, carrying, pushing, and pulling with the right hand. Additionally, he placed a ten to twelve pound lifting restriction with the right hand and also restricted pulling to twenty to twenty-five pounds. In McEldowney's opinion, Dick no longer retained the physical capacity to return to the type of work performed at the time of injury.

The ALJ reviewed all the above evidence and determined that Dick was entitled to benefits and that he no longer retained the physical capacity to perform the type of work he performed before injury. He was persuaded that although Dick had returned to work he would probably be unable to maintain his job or his current earning capacity into the indefinite future. Accordingly, the ALJ enhanced Dick's award using the 3-multiplier pursuant to KRS 342.730(1)(c)1 and awarded vocational rehabilitation pursuant to KRS 342.710.

Monroe filed a Petition for Reconsideration taking issue with the ALJ's application of the 3-multiplier. The ALJ denied the Petition, and Monroe subsequently filed an appeal with the Workers' Compensation Board. The Board affirmed the findings of the ALJ, and this appeal followed.

Monroe argues that the application of the 3-multiplier is not supported by substantial evidence. We disagree.

The issue on appeal is whether the evidence is so overwhelming as to compel the result Monroe seeks as a matter of law. *See Snawder v. Stice*, 576 S.W.2d 276 (Ky.App. 1979); *Wolfe Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky.App. 1984). The ALJ, as fact finder, has the sole authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1977). It is not enough to show that there is some evidence that would support a contrary conclusion. *McCloud v. Beth-Elkhorn Corporation*, 514 S.W.2d 46 (Ky. 1974). Additionally, so long as the ALJ's opinion is

supported by any evidence of substance, the Court of Appeals should not reverse.

Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

KRS 342.730(1)(c) provides, in pertinent part, that:

1. 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 injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection...
2. If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained....

In this case, the ALJ determined that Dick did not return to work at a weekly wage equal to or greater than his average weekly wage at the time of injury. This determination was supported by the payroll summary and wage records submitted into the record. Hence, no analysis under *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003) was required as Monroe would have us believe.

Furthermore, the ALJ found that Dick no longer retained the physical capacity to return to the type of work that he performed before the time of injury, which was supported by the expert opinion of Dr. McEldowney as well as Bonnie's and Dick's testimonies. The fact that the ALJ gave greater weight to Dr. McEldowney's opinion than to that of Dr. O'Neill or Dr. Best is within his sound discretion. *See e.g. Square D. Company v. Tipton*, 862 S.W.2d 308 (Ky. 1993).

We find that there is evidence of substance to support the ALJ's opinion, therefore we find no clear error. Accordingly, we affirm the judgment of the ALJ and the holding of the Workers' Compensation Board.

ALL CONCUR.

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