

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000871-WC

SCOTTY'S CONSTRUCTION AND STONE

APPELLANT

v. PETITION FOR REVIEW FROM A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-88398

TERESA A. MUSICK;
HON. A. THOMAS DAVIS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: DIXON AND KELLER, JUDGES; GRAVES,¹ SENIOR JUDGE.

KELLER, JUDGE: Scotty's Construction and Stone (Scotty's) petitions this Court for review of an opinion of the Workers' Compensation Board (the Board) affirming the Administrative Law Judge's (the ALJ) opinion and award regarding the calculation of Teresa A. Musick's (Musick) average weekly wage (AWW). Scotty's argues on appeal

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

that the Board incorrectly affirmed the ALJ's inclusion of "fringe benefits" in his calculation of Musick's AWW. We affirm. Because the AWW calculation is the only issue raised on appeal, we will only summarize the evidence as it relates to that issue.

FACTS

Musick suffered a work-related left knee injury on April 16, 2004, while working as a "traffic flagger" for Scotty's, an asphalt company. In her Application for Resolution of Injury Claim, Musick alleged that she had an AWW of \$350.00. In its Notice of Claim Denial or Acceptance (Form 111), Scotty's stated that Musick had an AWW of \$92.39. Scotty's attached a wage statement to its Form 111 showing that Musick earned \$8.00 per hour from April 20, 2003, through June 7, 2003, and \$8.75 per hour from June 8, 2003, through the date of the injury. Furthermore, the wage statement showed that Musick worked very few, if any, hours from August 31, 2003, through the date of injury, and that she earned \$6,928.49 in the 50 weeks preceding the injury for an AWW of \$133.24. The parties failed to reach an agreement regarding AWW and Musick ultimately filed copies of paycheck stubs for the year preceding her injury.²

Musick provided the only testimony regarding wages at the hearing. On direct examination, Musick stated that:

depending on what county we are in, we have a set scale pay per county -- for whatever county we're in. The county that I

² We note that the wage statement filed by Scotty's with its Form 111 grossly understated Musick's actual wages as reflected on Musick's paycheck stubs, even if the wages disputed herein are excluded. While we recognize that employers and/or their insurers often perform a quick calculation of AWW so that the payment of temporary total disability benefits can be initiated, employers and/or their insurers should review those calculations and make adjustments as necessary prior to filing wage statements with the Office of Workers' Claims.

was in when I got hurt, which was Edmonson County -- when I got hurt, that was twenty-one dollars an hour -- twenty-one fifty an hour. If we're on a private job, then my pay is nine dollars an hour . . . [b]ut, I am not under nine dollars an hour at any time.

On cross-examination, Musick testified as follows:

Attorney: Okay; the information he (Travis Johnson, Director of Human Resources and Safety) provided in the wage records show [sic] that your normal hourly rate was eight dollars, seventy-five cents an hour.

Musick: That is incorrect.

Attorney: Okay; now, when you filed your application you alleged that your average weekly wage was three hundred and fifty dollars, which is the number that you get when you multiply forty hours a week times eight dollars and seventy-five cents an hour. So, how did you come up with the three dollars and fifty -- I mean, the three hundred and fifty dollars a week that was alleged in your application?

Musick: I'm not sure.

Attorney: Okay; and, it's your contention now that you never earned less than nine dollars?

Musick: Nine dollars an hour.

Attorney: And, that sometimes you earned as much as twenty-one dollars?

Musick: Right -- correct.

Attorney: And, you're going to provide us with a W2 form for the year what?

Musick: It will be the year of 2003.

Attorney: Okay; now, that's not going to tell us, though, how many weeks you worked or anything like that.

Musick: Actually, I can provide you with my paycheck stubs for the year of 2003 also, if you -- if you need them. I have all of my paycheck stubs from 2003.

...

Attorney: If you would, have you got all -- in fact -- all of your paycheck stubs, if you would, up until the date of your injury, even including the few in 2004?

Musick: Uh-huh.

Attorney: If you'll provide those to your attorney and then he can provide copies to us.

Musick: I will -- be glad to.

Following the hearing, Musick filed the requested paycheck stubs from April 22, 2003, through December 16, 2003. The last paycheck stub shows total earnings of \$15,918.07, total deductions of \$4,648.68, and net pay of \$11,269.39.

The ALJ, after summarizing the evidence, found that Musick's employment was seasonal; therefore, KRS 342.140(2) controlled AWW calculations. Taking that statute into consideration and looking at Musick's last paycheck stub, the ALJ determined that Musick earned total wages of \$15,918.07 in the 50 weeks preceding her injury. The ALJ then divided that total amount by 50 and determined that Musick's AWW was \$318.36. The ALJ then based his award of permanent partial disability and temporary total disability benefits on that AWW. Scotty's filed a petition for reconsideration, requesting a re-calculation of the AWW. In doing so, Scotty's argued that \$3,866.01 of the total earned by Musick represented "fringe benefits" and that fringe benefits are not

properly included as part of AWW. Excluding the fringe benefits, Musick earned \$12,052.06 in the 50 weeks preceding her injury, which translates to an AWW of \$160.69. The ALJ denied Scotty's petition for reconsideration and Scotty's appealed to the Board.

In its brief to the Board, Scotty's argued that Musick's paycheck stubs contained three types of earnings, "straigh", [sic] "overtim", [sic] and "fringe." Because the paycheck stubs did not show any deductions for health insurance, Scotty's argued that the fringe payments represented "additional amounts to compensate [employees] for their 'fringe benefits.'" Musick argued before the Board, as she does here, that the fringe pay represented the additional pay rate she received depending on where she worked. The Board affirmed the ALJ, finding that the fringe payments were made directly to Musick, not to a third party on behalf of Musick, thus becoming part of Musick's "discretionary income." Furthermore, although the Board stated that Scotty's argument that the fringe payments represented payment in lieu of health insurance premiums was a reasonable interpretation, the Board found no evidence of that in the record. Finally, the Board found that "[a]bsent compelling evidence to the contrary, this Board is satisfied the definition of wages, which includes 'money payments for services rendered,' is broad enough to include the payment made to Musick in addition to her hourly wage." It is from this opinion by the Board that Scotty's appeals.

STANDARD OF REVIEW

The ALJ has the sole discretion “to determine the quality, character, and substance of the evidence” *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). “[T]he ALJ, as fact-finder, has the sole authority to judge the weight, credibility and inferences to be drawn from the record.” *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997). When reviewing the ALJ's findings, we must determine whether those findings are so unreasonable under the evidence that it must be viewed as “erroneous as a matter of law.” *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000).

ANALYSIS

Scotty's argues before us, as it did before the ALJ and the Board, that the payments designated “fringe” on Musick's paycheck stub represent “fringe benefits.” Furthermore, Scotty's argues that it was Musick's burden to clarify what those fringe payments were and her failure to do so means that those payments cannot be used in calculating AWW. Musick argues that, regardless of how the payments are characterized, the language of KRS 342.140(2) means that the fringe payments must be used to calculate her AWW.

At the outset, we note that Scotty's is correct that fringe benefits may not be used in calculating AWW. *Rainey v. Mills*, 733 S.W.2d 756, 758 (Ky.App. 1987). However, Scotty's argument notwithstanding, we hold that the evidence supports the ALJ's finding that the fringe payments were wages, not fringe benefits.

Because the ALJ determined that Musick was a seasonal employee, we must look to KRS 342.140(2) and (6) to determine if the fringe payments amounted to wages. KRS 342.140(6) defines wages as:

in addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging, and fuel or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer to the extent the gratuities are reported for income tax purposes.

KRS 342.140(2) provides that, for seasonal occupations, "the average weekly wage shall be taken to be one-fiftieth (1/50) of the total wages which the employee has earned from all occupations during the twelve (12) calendar months immediately preceding the injury."

As noted above, a review of the paycheck stubs reveals that there are three types of payments to Musick listed under "EARNINGS." Those payments are "straight," "overtime," and "fringe." The paycheck stub from April 29, 2003, reveals that Musick worked 32 hours straight time at the rate of \$8.00 per hour, eight hours straight time at \$16.41 per hour, two hours of overtime at \$12.00 per hour ($\8.00×1.5), and two and a half hours of overtime at \$24.61 ($\16.41×1.5) per hour. She also received \$64.89 as a fringe payment at the rate of \$6.18. Although the hours are not shown for the fringe payment, simply dividing the total amount paid, \$64.89, by the rate, \$6.18, reveals that the total fringe payment represents ten and a half hours of work at \$6.18 per hour. Since Musick worked ten and a half hours at the rate of \$16.41 per hour, it can be inferred that the fringe payment is related to those hours and that it is wages. Although we will not do

so in detail herein, we performed the same analysis on all of the paycheck stubs Musick filed. That analysis revealed that the total fringe payment amount, when divided by the fringe payment rate, corresponded exactly with the number of hours Musick worked at the higher hourly rate. Furthermore, the higher hourly rate (\$16.41) plus the fringe rate (\$6.18) equals a rate in excess of \$20.00 per hour, which is consistent with Musick's testimony that she made in excess of \$20.00 per hour on some jobs. Therefore, there was more than sufficient evidence to support the ALJ's conclusion that the fringe payments constituted wages not fringe benefits. Because the ALJ's opinion is supported by evidence of substance, we cannot reverse it on appeal.

Finally, we note Scotty's argument that "in black and white, on the face of each document filed by the Appellee, it was noted precisely how much of the payment received by the Appellee was designated for fringe benefits." However, we note that the phrase "fringe benefits" does not appear anywhere on the paycheck stubs in the record before us. Musick's earnings are designated as "straigh," [sic] "overtim," [sic] and "fringe." Scotty's simply added the word "benefits" when making its argument.

Although, we agree with Scotty's that Musick bears the burden of proof for every element of her claim, Scotty's could have clarified the meaning of "fringe" had it chosen to do so. Having chosen otherwise, Scotty's cannot now complain that the ALJ drew a reasonable inference from the evidence that differs from the one Scotty's preferred.

CONCLUSION

The ALJ's finding that the fringe payments were wages for average weekly wage purposes is supported by the evidence. Therefore, the Board's opinion affirming the ALJ is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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