

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000997-WC

HARDEE'S FOOD SYSTEMS, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-69621

GAIL ALLEN; HONORABLE LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE; AND KENTUCKY
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

** ** *

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

DIXON, JUDGE: Hardee's Food Systems, Inc. seeks review of a decision of the Workers' Compensation Board affirming an administrative law judge's award of permanent partial disability (PPD) benefits to Gail Allen, a former Hardee's employee. We find no error and affirm.

¹ Senior Judge J. William 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.

Allen, age 48, has an eleventh grade education, and she obtained a GED. Allen began working for Hardee's in 1979 at one of the company's restaurants located in Campbellsville, Kentucky. Allen received several promotions and ultimately became general manager of the Campbellsville restaurant. Allen served as the general manager for approximately twenty years. Allen resigned from her position at Hardee's in May 2006.²

On October 7, 2005, while working at the drive-through window, Allen bent at the waist to reach into the restaurant's safe. In the process of bending down, Allen experienced acute low back pain and was unable to stand upright for several minutes. She reported the injury to her supervisor and left work early to recuperate. Dr. Jerome Dixon, Allen's family physician, diagnosed Allen with a herniated nucleus pulposus and nerve root compression in her lumbar spine. Allen did not return to work until December 2, 2005.

Allen filed an application for resolution of injury claim with the Office of Workers' Claims on February 28, 2006. Allen alleged she sustained a disabling work injury on October 7, 2005, as well as cumulative trauma to her low back during the course of her employment. Hardee's filed a notice of claim denial, and a benefit review conference was held on July 13, 2006. Following a formal hearing on July 28, 2006, the ALJ rendered an opinion finding Allen suffered a work related injury and assessed a 10% impairment. The ALJ awarded Allen temporary total disability (TTD) benefits and PPD benefits. The ALJ subsequently denied reconsideration of the matter, and Hardee's

² Allen's resignation from Hardee's was unrelated to her workers' compensation claim.

appealed to the Board. The Board affirmed the ALJ's decision, and this petition for review followed.

Hardee's argues the ALJ's decision was not supported by substantial evidence. Specifically, Hardee's disputes Allen sustained an injury as defined by KRS 342.0011(1); rather, it contends that the evidence clearly showed Allen had a pre-existing back condition and suffered only a temporary exacerbation following the October 2005, incident. As such, Hardee's opines the award of PPD benefits was not supported by the evidence, and it was only liable for TTD benefits from October 9, 2005, through December 6, 2005.

It is within the province of the ALJ, as the finder of fact, to weigh the evidence and assess the credibility of witnesses. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). The ALJ “may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof.” *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). “Where a claimant 'is successful before the ALJ, the issue on appeal [to the Board] is whether substantial evidence supported the ALJ's conclusion.” *Carnes v. Parton Bros. Contracting, Inc.*, 171 S.W.3d 60, 68 (Ky.App. 2005) quoting *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925, 929 (Ky. 2002). “Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people.” *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000). When this Court reviews a decision of the

Board, our function “is to correct the Board only where [we] perceive 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.” *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

KRS 342.0011(1) defines “injury” as “any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.” Hardee's argues that Allen clearly had a pre-existing low back condition, and the medical evidence failed to show any change in her condition as a result of the October 7, 2005, accident. Hardee's principally relies on the independent medical evaluation performed by Dr. Ellen Ballard, who diagnosed Allen with pre-existing, non-work related, degenerative disc disease and pseudoarthrosis of the lumbar spine with chronic back pain. Hardee's also calls into question the records of Dr. Dixon, and opines that Allen sought treatment for back pain prior to October 2005.

Although Hardee's recites evidence favorable to its position, a review of the record indicates that the ALJ's factual determinations were supported by substantial evidence. Hardee's fails to recognize the testimony of Allen herself, whom the ALJ found to be reliable and credible. Likewise, the records of Dr. Dixon supported Allen's testimony that she suffered a disabling back injury on October 7, 2005. Finally, Dr. Dixon specifically found that Allen had no active low back impairment prior to her work-

related injury. As the finder of fact, the ALJ was free to choose among the conflicting medical evidence and find Dr. Dixon's assessment most reliable. *Copar, Inc. v. Rogers*, 127 S.W.3d 554, 561 (Ky. 2003).

Hardee's further opines that, because Allen returned to work in December 2005, without restrictions, she no longer suffered any disabling effects from the October injury. The ALJ, however, relied on Allen's testimony that her back pain continued after she returned to work. It is clear that Allen's lay testimony was competent evidence regarding the extent of her disability. *Hush v. Abrams*, 584 S.W.2d 48, 50 (Ky. 1979). Consequently, after reviewing the record and considering the deference owed the ALJ's decision, we find the Board neither erred in assessing the evidence nor misconstrued the law. *Western Baptist Hospital*, 827 S.W.2d at 687-88.

Finally, in her brief, Allen asks this Court to assess damages and/or costs against Hardee's pursuant to CR 73.02(4) based on Allen's belief that Hardee's filed a frivolous appeal. "An appeal or motion is frivolous if the court finds that it is so totally lacking in merit that it appears to have been taken in bad faith." CR 73.02(4). Based upon our review of the record, we find the arguments made by Hardee's were not completely without merit. As such, we decline to award Allen damages and/or costs in this matter.

For the reasons stated herein, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE

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