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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000191-WC

GARDENS GLEN FARM

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-69845

BETHANY (TAYLOR) BALDERAS;
HON. JANE RICE WILLIAMS, ADMINISTRATIVE
LAW JUDGE; and WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: JONES, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: Gardens Glen Farm appeals from an Opinion of the Workers' Compensation Board affirming the June 25, 2013 Opinion, Award and Order of Administrative Law Judge ("ALJ") Hon. Jane Rice Williams. The ALJ determined that Bethany (Taylor) Balderas suffered a worsening of a work-related injury

sustained when a horse she was riding fell and rolled over her. Gardens Glen appealed to the Board, arguing that the ALJ erred in calculating the credit for payments made to Balderas. We find no error in the Board's conclusion that the ALJ properly calculated the credit and, accordingly, affirm the Opinion on appeal.

The facts are not at issue. In 2006, Balderas was employed as an exercise rider at Gardens Glen. On November 18, 2006, she was riding a horse at Gardens Glen when it fell and rolled over her. Balderas sustained two fractured vertebra. She later underwent fusion surgery and returned to work without restrictions.

Balderas negotiated a lump sum settlement in the amount of \$100,000, which reflected a 29% impairment rating and a compromised return to work factor of 1.5509453. The settlement was approved by ALJ Sheila Lowther on August 20, 2007. On August 19, 2011, Balderas filed a Motion to Reopen in which she alleged a worsening of her occupational disability.

The matter proceeded before ALJ Williams, who rendered an Opinion, Award and Order on June 25, 2013, sustaining Balderas' motion. ALJ Williams determined that Balderas met her burden of proof of a worsening of her occupational disability based on objective medical evidence. She found that Balderas suffered a slightly increased whole body impairment from 29% to 30%, with a decreased range of motion in her cervical spine flexion, loosening of the surgical hardware and pseudo-arthritis with mild degenerative changes. ALJ Williams also determined that Balderas was no longer able to work as an exercise

rider. She rendered an award of \$275.83 per week for permanent partial disability beginning August 19, 2011, and continuing thereafter through the remainder of the 425-week period which began on the date of injury.

In reaching the award, ALJ Williams found that Balderas was entitled to the difference between the permanent partial disability rate of \$456.25 per week beginning August 19, 2011, and continuing for the remainder of the 425-week period per the settlement agreement, minus Gardens Glen's credit of \$180.42 per week for a remaining difference owing to Balderas of \$275.83 per week. In so doing, the ALJ concluded that Gardens Glen should be credited with the value of benefits of the original claim, rather than a dollar-for-dollar credit for the amount actually paid pursuant to the settlement agreement. Gardens Glen petitioned for reconsideration of the credit calculation, arguing that the value of the benefits of the original claim, as determined by the ALJ upon reopening, was substantially less than the lump sum settlement paid in 2006. The Motion for Reconsideration was denied.

Gardens Glen appealed to the Board, where it argued that the ALJ erred in her calculation of the credit it received. Gardens Glen maintained that it was entitled to a dollar-for-dollar credit for the amount paid pursuant to the settlement agreement, rather than a credit based on the value of the benefits that would have been payable from the 2006 claim. Upon considering the matter, the Board determined that the value of the 2006 claim, not the value of the settlement,

was the proper basis for calculating Gardens Glen's credit. It rendered an Opinion affirming the ALJ's Opinion, Award and Order, and this appeal followed.

Gardens Glen now argues that the Board erred in affirming the ALJ's ruling on the question of the credit offset to which it was entitled upon reopening. As it argued before the ALJ and the Board, Gardens Glen again maintains that it is entitled to a dollar-for-dollar credit for the settlement payment made to Balderas, rather than a credit calculated from the value of the 2006 claim had no settlement been reached. It directs our attention to *Crummies Creek Coal Co. v. Hensley*, 284 Ky. 243, 144 S.W.2d 206 (1940), and other case law in support of its claim that an employer cannot be ordered to pay benefits that have already been paid. Gardens Glen argues that *Dunn v. Slater*, 2008 WL 2484933 (Ky. 2008)(2007-SC-000202-WC)(2007-SC-000238-WC), and upon which the ALJ relied in part, is distinguishable in that *Dunn* had nothing to do with actual monies paid to a claimant in a lump sum. Gardens Glen also contends that the failure to provide proper credit for lump sum settlement payments discourages those payments, which in turn harms future parties. In sum, Gardens Glen argues that the ALJ's credit calculus was not supported by the law and must be reversed.

In sustaining the ALJ's Opinion, Award and Order, the Board relied in part on *Whittaker v. Rowland*, 998 S.W.2d 479 (Ky. 1999), and *Newburg v. Davis*, 841 S.W.2d 164 (Ky. 1992). In *Whittaker*, a 63-year-old maintenance worker injured his back and received an occupational disability settlement. About seven years later, he moved to reopen the claim upon alleging an increase in occupational

disability such that he was no longer able to perform even sedentary work. In addressing the credit to which the employer was entitled upon reopening, the Court stated:

With regard to the question of credit, it must be remembered that this appeal does not concern the reopening of a litigated award. The parties agreed to the terms by which they would settle the claim for the underlying injury, and upon claimant's receipt of the agreed-upon sum, the liability of the employer and the Special Fund for whatever occupational disability existed at the time of settlement was extinguished. *The figure for occupational disability which is contained in a settlement agreement represents a compromise and might or might not equal the worker's actual occupational disability at the time* See *Newberg v. Davis*, Ky., 841 S.W.2d 164, 166 (1992); *Newberg v. Chumley*, Ky., 824 S.W.2d 413, 416 (1992). [Emphasis added.]

Whittaker at 482. Additionally:

The disability figure contained in a settlement agreement is a negotiated figure and may or may not equal the claimant's actual occupational disability. Under KRS 342.125, a claimant is required to show that a change in his physical condition since the date of the settlement has produced an increase in his occupational disability during that period in order to reopen the award. *The relevant change in occupational disability, therefore, is the difference between claimant's actual occupational disability on the date of the settlement, regardless of the figure for which he settled, and his occupational disability at the time of reopening.* [Emphasis added].

Newberg at 166.

Newberg and its progeny are dispositive of the instant issue. The Kentucky Supreme Court held without equivocation that 1) the negotiated

settlement may not reflect the claimant's actual disability, and 2) the relevant change in occupational disability is the difference between the claimant's actual occupational disability on the date of settlement and his or her occupational disability at the time of reopening. As properly noted by the ALJ and the Board, this may work to the benefit of either the employee or the employer at the time of reopening, depending on the negotiated settlement.

The burden of persuasion is on the claimant to prove every element of a workers' compensation claim. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). On appeal, our standard of review of a decision of the Workers' Compensation Board "is to correct the Board only 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." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). Applying the foregoing to the instant facts, we cannot conclude that the Board has overlooked or misconstrued controlling statutes or precedent and find no error in the ALJ's calculation of the credit based on the actual award to which Balderas was entitled at the time of settlement rather than on the amount paid by the settlement.

For the foregoing reasons, we affirm the Opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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