

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 19, 2013

CLAIM NO. 201185176

CHRISTOPHER & BANKS CORPORATION

PETITIONER

VS.

APPEAL FROM HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE

MARY ANN LATHAM
and HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
REVERSING IN PART AND REMANDING

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. Christopher & Banks Corporation ("Christopher & Banks") seeks review of the June 18, 2013, opinion and award rendered by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ") finding Mary Ann Latham ("Latham") sustained a work-related injury to her right arm on May 31, 2011, and awarding temporary total disability ("TTD") benefits and permanent partial disability ("PPD")

benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1. The ALJ also awarded medical benefits. Christopher & Banks also appeals from the July 17, 2013, order denying its petition for reconsideration.

On appeal, Christopher & Banks challenges the ALJ's determination Latham had concurrent employment at the time of her injury as well as her calculations of Latham's average weekly wage ("AWW") based on a finding of concurrent employment. Christopher & Banks argues Latham did not have concurrent employment and was an independent contractor. Alternatively, it argues the ALJ erroneously calculated the AWW based on concurrent employment.

Latham was injured on May 31, 2011, when she fell at work and fractured her right forearm. As a result, she underwent multiple surgeries. In 2010 and 2011, during the time Latham was an employee of Christopher & Banks, starting in March and ending in May of each year, she also refereed church league basketball games for Beacon Hill Baptist Church ("Beacon Hill"). The dispute on appeal centers on whether the ALJ correctly determined Latham had concurrent employment with Beacon Hill as defined in KRS 342.140(5).

At her February 15, 2013, deposition, Latham testified regarding her work as a referee for Beacon Hill as follows:

Q: Okay. And have you returned to work doing anything else?

A: Yes.

Q: You've refereed basketball?

A: Yes, sir.

Q: Okay. And when is the last time you've done that?

A: 2011.

Q: Okay. When in 2011?

A: March.

Q: March of - okay, that was before your accident?

A: Yes, sir.

Q: Okay. How about after?

A: No, sir.

Q: Okay. And where did you referee for?

A: Basketball.

Q: I mean, for a church league?

A: Yes, sir, Beacon Hill Baptist Church in Somerset.

Q: Beacon Hill?

A: Yes, sir.

Q: And how were you paid?

A: Check.

Q: Okay. And who would write the check? Would it be Beacon - what was that again?

A: Beacon Hill Baptist.

Q: Okay. Would the checks come from them?

A: Yes, sir.

Q: And who would write you the check?

A: Don't recall.

Q: Well, I mean, would the pastor right [sic] the check or the bookkeeper?

A: I'm assuming bookkeeper.

Q: Okay. And how much would you - did you get per game?

A: \$20.

Q: And how many games would you do on a Saturday or Sunday?

A: I didn't referee on Saturday or Sunday.

Q: Okay. Something during the week, then?

A: Monday evening.

Q: Okay. And how many games?

A: From 6:00 until 10:00, four.

Q: Okay. And how did you get the job refereeing?

A: They had heard about me. I did some refereeing for the 12th region.

Q: Okay. What is the 12th region?

A: Basketball, you know, like Somerset.

Q: Okay.

A: Whitesburg.

Q: Did you have to go to school or something for classes?

A: No, sir.

Q: Okay. And how did you get into that?

A: A friend of mine.

Q: Did you have a little striped shirt and a whistle?

A: Yes, sir.

. . .

Q: Okay. And who was your contact person over there at Beacon Hill?

A: Marty Hollingshead.

Q: Okay. What was that again slow?

A: H-O-L-L-I-N-G-S-H-E-A-D.

Q: S what?

Mr. Vanover: H-E-A-D, head.

Q: Okay. And you - are you working anywhere else?

A: No, sir.

During the April 25, 2013, hearing, she again testified about refereeing for Beacon Hill. Her testimony is as follows:

Q: I know you had a second love, what you were doing in your spare time so to speak. That was what?

A: I was a referee.

Q: And were you like a licensed referee for ...

A: I was a licensed referee with the NCAA 12th Region for three years and once I got my promotion I stopped doing that because I had to travel, and I went to referee for Beacon Hill Baptist Church.

Q: Were you compensated for that work?

A: Yes, sir.

Q: And you were doing that at the same time that you were an employee of Christopher and Banks?

A: Yes, sir.

Q: And they were aware of your extra job ...

A: Yes, sir.

Q: .. and that you were out there doing this because, number one, you loved it, and number two, you liked to get out and get exercise doing that sort of thing?

A: Yes, sir.

. . .

Q: In regard to the refereeing you were talking about earlier, you said that your employer was aware of the refereeing?

A: Yes.

Q: How were they aware of it?

A: Well, they were aware of it because I talked about it. I would bring my uniform to work and change, you know, before the ballgame on Monday evening. My boss was aware of it, my district manager was aware of it.

Q: Who was your boss at that time?

A: April Marples, and she's still employed with Christopher.

Q: Now, what season was it that you were refereeing?

A: It would start in March and it would be over near the end of May. It was three months.

Q: How was the form of payment? Did they pay you by check or by cash or by direct deposit?

A: By check.

Q: By check?

A: Yes, sir.

Q: And who was it that would issue the check?

A: Marty Hollingshead. He's the youth minister at Beacon Hill Baptist Church.

Significantly, Latham admitted she never received a W-2 from Beacon Hill.

After the hearing, Christopher & Banks filed Beacon Hill's records covering Latham's basketball

refereeing activities in 2010 and 2011.¹ Also attached was Christopher & Banks' calculations of Latham's AWW based solely on her earnings at Christopher & Banks over the 52 week period prior to the work injury.

In the June 18, 2013, opinion and award, the ALJ entered the following analysis, findings of fact and conclusions of law regarding Latham's AWW:

The evidence concerning average weekly wage comes from the Plaintiff's testimony and the documentary evidence. There is no evidence contrary to Plaintiff's testimony that she was receiving concurrent wages from Beacon Hill Baptist Church for her refereeing at the time of this injury. As noted above, Plaintiff's her [sic] testimony is verified by the documents from the church. At the time of this injury and the year previous, Plaintiff refereed basketball for the church for three months - averaging \$80.00 per week.

Although the Defendant/employer argues Plaintiff was not concurrently employed and cites Wal-Mart vs. Southers 152 SW3d 242 (Ky.App. 2005) in support of its position, the undersigned finds that Southers is actually supportive of the Plaintiff's position. The Court states in pertinent part:

...Wal-Mart claims the irregularity of Southers's employment with H & R Block and the fact she did not receive a regular paycheck is conclusive proof she was not

¹ These documents were attached to Christopher & Banks' motion to stipulate AWW.

under a contract for hire. Wal-Mart points to the evidence indicating Southers was not receiving remuneration from H & R Block on the date of her injury as proof she was not concurrently employed. Likewise, Wal-Mart claims the intermittency of her employment frustrated the mutuality of obligation requirement needed to establish a valid contract. We disagree.

We note at the outset there is nothing in the relevant statute that requires proof of remuneration to establish concurrent employment. Moreover, Wal-Mart has not provided any support for its contention that intermittent employment necessarily negates the existence of mutuality of obligation. The statute in question only lists two elements necessary to establish concurrent employment: proof the claimant was working under contracts with more than one employer at the time of injury, and proof the defendant employer had knowledge of the employment. (Emphasis ours).

Wal-Mart conceded it had knowledge of Southers's employment with H & R Block. Therefore, that element of the statute has been satisfied. With regards to the second element, the ALJ conclusively found Southers was working under contract

for both Wal-Mart and H & R Block at the time of her injury.

The undersigned finds the two elements required by the statute are met here - the Defendant/employer knew Plaintiff was concurrently employed and, secondly, Plaintiff was working under contract for both Beacon Hill Baptist Church and the Defendant/employer at the time of her injury. Accordingly, I find that Plaintiff was concurrently employed at the time of this injury by the Defendant/employer, Christopher & Banks, and Beacon Hill Baptist Church. In making this finding, I rely upon the testimony of the Plaintiff and the documents of wages from Beacon Hill as well as the cover letter dated February 4, 2013.

The Defendant/employer has submitted wage documentation indicating Plaintiff's average weekly wage was \$328.93 in the quarter from March 12, 2011 through June 4, 2011. In calculating the concurrent average weekly wage, we add the wages of the Defendant/employer (\$328.93) with the average weekly wage of the concurrent employer (\$80.00), for a total average weekly wage of \$408.93. Therefore, the Plaintiff's concurrent average weekly wage at the time of this injury was \$408.93. In making this finding I have relied upon the wage records submitted by the Defendant/employer, the wage information supplied by Beacon Hill Baptist Church and Plaintiff's testimony.

The ALJ determined Latham had a 25% permanent impairment which pursuant to KRS 342.730(1)(b) converted into a 28.75% permanent partial disability. Based on her

calculation of Latham's AWW of \$408.93, the ALJ awarded PPD benefits of \$266.49 per week and TTD benefits from June 1, 2011, through November 28, 2012, of \$272.62 per week. Because Christopher & Banks had paid TTD benefits of \$216.70 per week, the ALJ concluded there had been a weekly underpayment of \$55.95.

In its petition for reconsideration, as it does on appeal, Christopher & Banks asserted the ALJ erred in determining Latham had concurrent employment and in calculating Latham's AWW by including the income she earned refereeing for Beacon Hill. It also requested additional findings of fact as to whether Latham was an independent contractor when refereeing for Beacon Hill as well as whether she was under a contract of hire with Beacon Hill at the time of injury. Christopher & Banks requested the ALJ enter a finding that Latham's AWW was \$328.93 which was based solely upon her earnings from Christopher & Banks.

Finding no error in her calculation of AWW and that Latham had concurrent employment, the ALJ denied the petition for reconsideration.

On appeal, Christopher & Banks asserts the ALJ erred in finding there was concurrent employment. It contends concurrent employment has to be the kind of work covered under the Act, the employer has to be aware of it,

and there must be a contract of hire at the time of the accident. It asserts none of these requirements were met here. It contends Wal-Mart v. Southers, 152 S.W.3d 242 (Ky. App. 2005) requires there be "concurrent contracts for employment" at the time of the work injury. It argues Latham last worked during the 2011 basketball season on May 18, 2011; thus, Latham was not under a contract of hire at the time of her injury on May 31, 2011.

Christopher & Banks notes the wage records from Beacon Hill show Latham was paid \$20.00 per game and there were no deductions from her check. Christopher & Banks posits Beacon Hill did not have "a year-round referee as an employee." Therefore, Latham was an independent contractor. It requests the determination of Latham's AWW be vacated. Christopher & Banks also makes alternative arguments regarding the ALJ's erroneous calculation of Latham's AWW based on concurrent employment.

Latham, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of her cause of action, including her AWW. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Latham was successful in that burden concerning her AWW, the question on appeal is whether substantial evidence of record supports the ALJ's

decision regarding AWW. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Concerning Christopher & Banks' argument on appeal, the relevant statute is KRS 342.140, Sections (1)(d) and (5) which reads as follows:

(1) If at the time of the injury which resulted in death or disability or the last date of injurious exposure preceding death or disability from an occupational disease:

. . .

(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, third, or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the injury;

. . .

(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.

We conclude Latham's refereeing did not constitute concurrent employment and substantial evidence does not support the ALJ's finding of concurrent employment. Further, assuming *arguendo*, Latham had

concurrent employment with Beacon Hill, the evidence is clear that at the time of her injury, Latham was no longer working under a contract of hire with Beacon Hill. The first sentence in each of the above-cited sections imply the employee's work status at the time of the injury is key. Section (5) is applicable only when the employee is working under concurrent contracts at the time of the injury and not at some point prior to the work injury. Thus, the ALJ erred in including the sums Latham earned from refereeing in calculating her AWW.

In reviewing Latham's testimony, we note she did not testify there was a contract of hire between she and Beacon Hill. Likewise, she did not testify she was employed by Beacon Hill as a referee. Rather, her testimony was that she refereed games for Beacon Hill every Monday and was paid on a per game basis. There was no testimony the money she received from Beacon Hill constituted wages. She also testified she did not receive a W-2 from Beacon Hill. Finally, Latham did not identify Marty Hollingshead ("Hollingshead") as her supervisor or boss; rather, she indicated he was her "contact person."

Indeed, Beacon Hill's records, obtained by Christopher & Banks after the hearing and introduced into the record, support the premise Latham was not Beacon

Hill's employee. The February 4, 2013, letter of Hollingshead, pastor of youth and activities at Beacon Hill, was attached to the summarizations of the checks written to Latham in 2010 and 2011. In addition, invoices relating to the games Latham refereed each year were also attached to his letter.

In his letter, Hollingshead stated he attached copies of the check stubs evidencing payment to Latham in 2010 and 2011 for refereeing during these years. He noted Latham had been invited to referee the men's basketball league in 2012, but had declined. The list of checks written to Latham in 2010 reflects she received nine checks, the first of which was dated March 24, 2010, and the last dated May 26, 2010. During 2010 Latham was paid \$700.00. The list of checks does not indicate the actual dates Latham refereed basketball games. The list of checks written to Latham in 2011 reflects she received nine checks, the first of which was dated March 9, 2011, and the last dated May 18, 2011. During that period Latham was paid \$860.00. Both lists of checks contain the following heading: "Beacon Hill Baptist Church List of Checks by Vendor." The vendor was listed as Linnie Latham. The lists do not indicate Latham was an employee of Beacon Hill.

The invoices pertaining to Latham's refereeing activities in 2010 and 2011 are informative. We will not discuss the 2010 invoices. The invoices for 2011 are dated March 9, March 23, March 30, April 13, April 20, April 27, May 4, May 11, and May 18. On each invoice the vendor is listed as Linnie Latham. The invoice description is adult basketball referee and varying amounts are shown on each invoice. Latham is not listed as an employee and there are no listed deductions from the amount of the check issued to Latham. Thus, we believe Latham's testimony and Beacon Hill's records compel a finding she was an independent contractor and not an employee of Beacon Hill in 2010 and 2011. Clearly, Beacon Hill's records do not establish Latham was an employee. Rather, the records indicate Latham was an independent contractor providing basketball refereeing services between March and May of 2010 and 2011. We are buttressed in our conclusion by Hollingshead's statement that Latham was "invited" to return as a referee for the 2012 season but declined. That statement can only be interpreted as meaning Latham was not an employee of Beacon Hill during the time she was paid to referee basketball games.

We have reviewed Latham's brief to the ALJ. We note she made no assertion that she was an employee of

Beacon Hill at any time she acted as a referee. Rather, Latham argued her uncontradicted testimony was that from March through May of 2010 and 2011, with the full knowledge of Christopher & Banks, she worked as a referee every Monday night from 6:00 p.m. to 10:00 p.m. and was paid \$20.00 per hour or \$80.00 per week. Thus, \$80.00 should be added to the \$326.38 she earned from Christopher & Banks resulting in an AWW of \$406.38. At no time in her brief did Latham argue she was an employee of Beacon Hill.

We find the ALJ's reliance upon Wal-Mart v. Southers, supra, to be misplaced. Unlike in Southers, Latham never testified that she was employed by Beacon Hill and that her employment was intermittent. In addition, Latham did not testify she was an on-call employee with Beacon Hill throughout the year. As required by Southers, there was no proof, documentary or otherwise, establishing there was ever a contract of hire between Beacon Hill and Latham. Even though Christopher & Banks may have known Latham was a basketball official, nothing in the record establishes it ever knew Latham was working under a contract of hire with Beacon Hill at any point during her employment with Christopher & Banks. The fact it knew Latham may have refereed games for Beacon Hill does not

establish Christopher & Banks was aware Latham was an employee of Beacon Hill.

Assuming, *arguendo*, Latham was working under a contract of hire with Beacon Hill, it is clear from her testimony that her employment with Beacon Hill had terminated as of the time of the injury. Hollingshead's February 4, 2013, letter indicates Latham had been invited to referee the men's basketball league in 2012 and had declined. The list of checks and Hollingshead's letter conclusively establish that at the time of the injury, Latham had stopped refereeing games for Beacon Hill in 2011, and was not working under concurrent contracts of hire with Christopher & Banks and Beacon Hill at the time of injury. Although Beacon Hill's records do not establish when Latham last refereed a basketball game in 2011, the records establish the last check issued in 2011 was dated May 18, 2011. Thus, any hypothetical employment Latham may have had with Beacon Hill ended some thirteen days prior to her injury on May 31, 2011. In Southers, supra, the Court of Appeals instructed:

In order for compensation to be payable under a claim for workers' compensation benefits, "there must be a contract of hire between the employer and the employee." [footnote omitted] The contract does not have to be written; however, "all of the

elementary ingredients of a contract must be present." [footnote omitted] In a workers' compensation claim, "the threshold requirement ... is that the claimant must be an employee for hire. The essence of compensation protection is the restoration of a part of wages which are assumed to have existed." [footnote omitted]

. . .

The statute in question only lists two elements necessary to establish concurrent employment: proof the claimant was working under contracts with more than one employer at the time of injury, and proof the defendant employer had knowledge of the employment.

Id. at 246.

In the case *sub judice*, there is no question that at the time of her injury, Latham did not satisfy the initial element necessary to establish concurrent employment; i.e. that she was working under contracts of hire with Beacon Hill and Christopher & Banks at the time of her injury. Since Latham was not working under concurrent contracts with Beacon Hill and Christopher & Banks on May 31, 2011, the ALJ erred by including the amounts paid to Latham for refereeing basketball games for Beacon Hill in calculating AWW.

In light of our ruling regarding Christopher & Banks' initial argument, all other issues raised on appeal by Christopher & Banks are now moot.

Accordingly, those portions of the June 18, 2013, opinion and award and the July 17, 2013, order relating to the ALJ's determination Latham had concurrent employment and calculation of Latham's AWW are **REVERSED**. Further, the award of PPD benefits and TTD benefits based upon an AWW of \$408.93 is also **REVERSED**. This claim is **REMANDED** to the ALJ for calculation of Latham's AWW based solely upon her earnings with Christopher & Banks and entry of an amended opinion and award awarding PPD benefits and TTD benefits based upon the ALJ's recalculation of Latham's AWW.

ALL CONCUR.

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