# Barlow v. Desa International

2000 | Cited 0 times | Court of Appeals of Kentucky | September 29, 2000

10:00 a.m.

TO BE PUBLISHED

OPINION

REVERSING AND REMANDING

Felicia Barlow (Barlow) petitions for a review of an opinion of the Workers' Compensation Board (Board), which affirmed the opinion of the Administrative Law Judge (ALJ) awarding her temporary total disability (TTD) benefits and permanent partial disability (PPD) benefits under Kentucky Revised Statute (KRS) 342.140 based on a finding that she was a seasonal employee. The only issue presented in this appeal is whether the Board erred in holding that Barlow was a "seasonal employee." Having concluded that the Board misconstrued the relevant statute, we reverse and remand.

Barlow became employed at DESA International, Inc., which manufactures oil and gas residential heating units, in September 1994. During her employment as an assembly line worker, she began experiencing pain and discomfort in her hands. In July 1996, Barlow reported her physical problems to her supervisor and sought medical attention. She was initially diagnosed as suffering with bilateral carpal tunnel syndrome. She was prescribed pain medicine and told to restrict repetitive wrist motion.

After having been off work since December 1997 because of a regular layoff, Barlow returned to DESA on July 6, 1998, but she again experienced pain and numbness in her hands. After working two days, she was unable to continue adequate performance of her job because of her physical problems and has not returned to work.

Barlow filed an application for resolution of injury claim in July 1998. The parties waived a formal hearing before the ALJ and he rendered a decision finding that Barlow's injury was work related and awarded her TTD benefits of $133.23 per week and PPD benefits of $19.98 per week from both DESA and the Special Fund based on her average weekly salary as a seasonal employee. [1] The ALJ denied the Special Fund's motion to reconsider. Barlow appealed the ALJ's opinion on her status as a seasonal employee to the Board. A divided panel of the Board affirmed and now Barlow petitions this court for review.

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Barlow argues that the Board erred in deciding that she should be characterized as a "seasonal employee" under KRS 342.140(2). While she concedes that she only worked a portion of the year, she maintains that DESA employed most workers only a portion of the year as a purely economic decision in order to circumvent having to pay them as full-time employees. Barlow asserts that the manufacture of heating units is not unique nor environmentally dependent so as to restrict it to certain seasonal periods. Consequently, she argues that KRS 342.140(2) was not intended to cover her type of situation.

Initially, we note that this appeal involves a mixture of factual and legal issues connected with statutory construction. Generally, the construction and application of a statute are matters of law that may be reviewed de novo. Reis v. Campbell Co. Bd. of Educ., Ky., 938 S.W.2d 880, 886 (1996); Louisville Edible Oil Products, Inc. v. Revenue Cabinet, Ky. App., 957 S.W.2d 272, 274 (1997); KRS 13B.150(2). Meanwhile, factual findings of the ALJ are binding as long as they are supported by substantial evidence. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986); Halls Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327, 328 (2000). Although a court must give deference to an administrative agency's findings of fact, an appellate court may correct the Board where it has overlooked or misconstrued controlling statutes or legal precedent. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992); Whittaker v. Rowland, Ky., 998 S.W.2d 479,481 (1999).

KRS 342.140(2) deals with calculation of the average weekly wage for seasonal workers. It states:

In occupations which are exclusively seasonal and therefore cannot be carried on throughout the year, 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.

Barlow asserts that the focus should be on the ability of DESA to manufacture heating units year-round. She argues that DESA is not compelled by environmental factors beyond its control to limited production during a particular period of the year. She contends the statute should be construed narrowly to prevent employers from failing to adequately compensate employees by intentionally circumventing the scope of the statutes. Barlow argues that she was not engaged in an occupation that was "exclusively seasonal."

After reviewing both statutory and case law, we agree with the views expressed by Board Member Stanley in his dissent, and adopt his opinion as follows:

KRS 342.140(2) defines seasonal employment as those "occupations which are exclusively seasonal and therefore cannot be carried on throughout the year." (Emphasis added.) The specific language used in this definition leads me to an opposite conclusion from that reached by the majority regarding the nature of Barlow's job.

First, §140(2) speaks in terms of "occupations" rather than "employment." In my opinion, the Legislature's reliance on the term "occupations" must be viewed as intentional. In matters of statutory construction, we are obligated to give an interpretation construing the specific language of the statute in accordance with its common and approved usage. Claude N. Fannin Wholesale Co. vs. Thacker, Ky. App., 661 S.W.2d 477 (1983). As a reviewing body, this Board must avoid an interpretation that is at variance with the stated language of a statute. Layne vs. Newberg, Ky., 841 S.W.2d 181 (1992). Additionally, we must assume that the Legislature is aware of previous constructions of statutory language and likewise is aware of the common law usage. Reed vs. Greene, Ky., 243 S.W.2d 892 (1951); Grieb vs. National Bond & Investment Co., Ky. 94 S.W.2d 612 (1936); Reisinger vs. Grayhawk Corp., Ky. App., 860 S.W.2d 788 (1993).

Kentucky authority defines "occupation" as having reference to the principal or regular business of a worker's life. It also denotes an employer's trade, profession, or other vocation or calling. Benefit Association of Railway Employees vs. Secrest, 239 Ky. 400, 39 S.W.2d 682 (1931). It generally signifies one's regular business and is indicative of the principal or usual business in which an employer and worker engage.

"Employment" is a much more narrow term referring to the specific task that an employee is hired by an employer to perform. It is not necessarily representative of an entire vocation but may only involve a small component of an overall occupation. It concerns the activity of the worker specifically performed on a day-to-day basis.

DESA is a factory not a farm. As a vocation, DESA and its competitors operate year around. Simply because a factory may have anticipated layoffs throughout a year, in my opinion, is insufficient to qualify that industry as seasonal in nature.

I believe KRS 342.140(2) requires the occupation in question to be "exclusively seasonal." It must generally involve a type of business which "cannot be carried on throughout the year" at an employer's pleasure. Production amounts and times must be beyond the control of the employer.

"Exclusive," according to Black's Law Dictionary, is defined in relevant part as "sole, shutting out, debarring from interference or participation." Given the term's use in §140(2), I believe the Legislature intended that an employer involved in a specific occupation or trade shall, for reasons beyond the employer's control, have no other reasonable choice except to conduct business activity during certain periods of the year. In other words, the activity that is the subject of business cannot be carried out except at limited intervals. In my opinion the Legislature intended reference only to prohibitions caused by the seasons of the year, not prevailing market trends or profit margin considerations, to delineate when a certain trade or vocation is "seasonal."

Here, there is no question but that DESA, if consumer demand merited, could operate its factory year around producing sufficient numbers of heaters to guarantee greater profits. DESA is not limited as

is a farmer to the manufacturing of product[s] during a growing season. By its own admission, given sufficient numbers of bad winters around the globe, the elimination of competition or acquisition of increased market share, DESA would be in full time production of heaters.

For these reasons, I firmly believe that Barlow's employment with DESA fails to meet the requirement of KRS 342.140(2). Her work at DESA was not exclusively seasonal and could at the leisure to her employer be carried out at any time. As such, I would reverse and remand with instructions that the computation of Barlow's average weekly wage be calculated in accordance with KRS 342.140(1).

Thus, Barlow should not be classified as a seasonal employee under KRS 342.140(2). Consequently, the Board erred in determining her average weekly wage under KRS 340.140(2) rather than KRS 340.140(1)(d). We reverse the decision of the Workers' Compensation Board and remand for further proceedings consistent with this opinion.

ALL CONCUR.

1. The ALJ also awarded her payment of her medical expenses. The PPD benefits were based on a 30% occupational disability.