RENDERED: MAY 4, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002065-WC

DONNA OLSON — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-00536

HARDIN COUNTY BOARD OF EDUCATION;
HON. W. BRUCE COWDEN, JR.,
ADMINISTRATIVE LAW JUDGE;
HON. ROBERT L. WHITTAKER,
DIRECTOR OF SPECIAL FUND AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Donna Olson had filed a petition for review of an opinion rendered by the Workers' Compensation Board on July 23, 1999. Having concluded that the Board has not overlooked or misconstrued the law or committed an error in assessing the evidence so flagrant as to cause gross injustice, we affirm.[1]

[1] Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

Olson, who was born on March 6, 1956, was injured on May 22, 1996, while working as a classroom assistant for the Hardin County Board of Education. Olson's duties included helping children with special needs, e.g., disabled children and children with behavioral problems. She was injured when a child, weighing approximately 80 pounds, hugged her and pulled on her neck as she was helping him into a wheelchair. Olson heard her neck pop and afterwards felt as though she "had a crick" in her neck. Within a few weeks, she experienced pain and stiffness in her shoulders and a tingling in her arms and hands. Approximately four months later, she began to experience low back pain.

Olson's injury caused her to miss approximately two weeks of work near the time of the injury. However, after she returned to work, she worked at her normal job duties until January 18, 1998, at which time she voluntarily resigned. She has not sought employment since her resignation. In her brief, Olson stated that "[s]he does not believe that there are any jobs with the Board of Education which she can do. She currently performs only light housework." She described her pain and physical limitations as follows:

> Olson testified that she sleeps two or three hours at a time. She has headaches and stinging sensations down her arm with stabbing pain in the fingers and her fingers draw up. She complains of dropping things. The pain has started down into her back, hip and into her right leg.
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> . . .
>
> Olson testified that she can stand or sit for 10 to 15 minutes at a time but not

> longer. She cannot perform any overheard work nor can she perform any work involving bending."
>
> . . .
>
> At the hearing Olson testified that the pain is in the back of her neck at the base of her head going down into the shoulders and now into the back. It is in the lower back by the shoulder blades, primarily on the right side. The pain goes down into the arm all the way to the fingers. Olson indicates the ache in her arms is always there, and she can even be sitting and her fingers will go to sleep. Pain into the neck and shoulder blade is a "come and go" pain, the ache is a constant ache. Olson describes the pain as stinging and does not have full use of her right arm. Olson indicates she can carry a gallon of milk (8 pounds) from the refrigerator to the cabinet but not further. Olson does not sleep through the night and is currently on anti-inflammatories and pain killers.

Olson was first treated by a chiropractor, and then, in July 1996, came under the care of Dr. Raymond Shea, a Louisville orthopedic surgeon. Dr. Shea performed an MRI, which revealed evidence of an osteophytic spur and a small herniated disk at C4-5 centrally located without intervertebral foraminal compromise. He prescribed conservative treatment, consisting of medication and physical therapy. Olson was referred to Dr. John Guarnaschelli, a Louisville neurosurgeon, in January 1997 for a second opinion regarding the need for surgery. Surgery has not been recommended.

Olson introduced at her hearing before Administrative Law Judge W. Bruce Cowden, Jr., a medical report from Dr. Shea, which assessed a 25 percent impairment due to her "lumbrosacral spine," but it did not indicate that Olson was under any medical

restrictions or medically unable to work. Dr. Shea made no reference to the AMA Guides.

Olson also submitted a medical report from Dr. Guarnaschelli, which indicated that the MRI showed evidence of a C4-5 disk herniation. He opined that Olson exhibited multiple level cervical spondylosis with predominance at C4-5.

Dr. Charles M. Hargadon, an orthopedic surgeon from Louisville, examined Olson on May 13, 1998, at the request of the employer. He reviewed the cervical spine x-ray dated December 23, 1996, and agreed with the interpretation that it revealed central disk herniation at C4-5 without significant compression of the underlying cord and osteophytic spur and protruding disk at C5-6. He diagnosed Olson with degenerative disk disease of the cervical spine with superimposed strain and believed her prognosis was fairly good. He assessed Olson with a DRE cervical-thoracic Category II, which is a 5% whole body impairment.

The ALJ noted that Olson "argues that she is 100% disabled based on her limited prior work experience, her disability rating and her subjective complaints[, or][i]n the alternative, [she] argues that her occupational loss is in the range of 60-65%." The employer "argues that [Olson] is employable and that . . . [she] continued working from May of 1996 until January of 1998 at which point she resigned for personal reasons." The employer "advocates that KRS[2]

[2]Kentucky Revised Statutes.

342.730(1)(b), as amended by the 1994 legislature caps benefits at two times the functional impairment rating."

The ALJ accepted the employer's argument and stated:

> After considering all the arguments of counsel, the ALJ must conclude that KRS 342.730(1)(b) applies so as to cap the petitioner's occupational disability at 10% and the ALJ so finds that her occupational disability is 10% or two times the functional impairment rating assessed by Dr. Hargadon. Th ALJ notes that the petitioner continued to work until January of 1998 until she resigned. There has been no medical evidence introduced to suggest that the petitioner can not return to her work at the Board of Education. It must be pointed out that although Dr. Shea has assessed a 25% impairment rating, there is no evidence in the record that this impairment rating was pursuant to the 4th edition of the AMA Guidelines nor was there a finding in the medical report which connect the 25% impairment to the work event. For this reason, the ALJ finds that the plaintiff has failed in her burden to show that the lumbar complaints are work related.

In Olson's appeal to the Board, it framed the issue as whether "the ALJ erred in capping petitioner's benefits at two times her impairment rating and [whether] the ALJ should have relied on the occupational standard of Osborne v. Johnson."[3] The Board noted that "Olson contends that in order for an ALJ to apply the 'two times functional impairment formula,' a workers' compensation claimant must be earning actual wages equal to or greater than wages paid as of the date of injury. Being 'employable' at wages greater than or equal to the date of injury is not the standard according to Olson."

[3]Ky., 432 S.W.2d 800 (1968).

KRS 342.730(1)(b), as amended in 1994, and prior to December 12, 1996, stated, in relevant part, as follows:

> For permanent, partial disability, where an employee returns to work at a wage equal to or greater than the employee's preinjury wage, sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740, multiplied by his percentage of impairment caused by the injury or occupational disease as determined by "Guides to the Evaluation of Permanent Impairment," American Medical Association, latest edition available, unless the employee establishes a greater percentage of disability as determined under KRS 342.0011(11), in which event the benefits shall not exceed two (2) times the functional impairment rate, for a maximum period, from the date the disability arises, of four hundred twenty-five (425) weeks subject to the provisions of subsection (1)(d) of this section.

The Board addressed KRS 342.730(1)(b), and stated as follows:

> Based upon the above language, when a claimant returns to work at the same or greater wages as before the injury, the claimant's percentage of occupational disability for injuries occurring between April 4, 1994 and December 11, 1996 is determined by either their impairment established by the AMA Guides or two times the functional impairment rating, if so proven. With the advent of the above statutory section, the Legislature limited an employee's ability to receive disability benefits when he or she has not suffered a reduction in her income after the injury. Under KRS 342.730(1)(c) as it existed at the time of Olson's injury, where an employee does not return to the same job at the same wage, then disability may be established under KRS 342.0011(11) and the principles outlined in Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968).

We agree with Olson's argument to the extent that we believe that doing any work at all at a wage equal to or greater than the pre-injury wage does not necessarily qualify as a "return to work" as contemplated by KRS 342.730(1)(b). Conversely, simply because the same employee fails or refuses to return to work does not invoke the provisions under §730(1)(c) to the exclusion of §(1)(b). This Board has routinely held in the past that if the ALJ finds that the claimant could have continued in such employment indefinitely, he or she is subject to the limitations of KRS 342.730(1)(b). To hold otherwise would merely discourage claimant's from making any attempts to return to work following an injury. This would clearly be contrary to one of the primary purposes of KRS Chapter 342. See, KRS 342.710(1).

Whether a claimant retains the ability to return to work at a wage equal to or greater than her pre-injury wage is a question of fact for the ALJ. A claimant in a workers' compensation action has the burden of proving his or her entitlement to benefits under Chapter 342. Snawder v. Stice, Ky.App., 576 S.W.2d 276 (1979). Where the party who bears the burden of proof is unsuccessful before the ALJ, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735 (1984). Compelling evidence is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, Ky.App., 691 S.W.2d 224 (1985). It is not enough for Olson to show there is merely some evidence that would support a contrary conclusion. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). So long as the ALJ's decision is supported by any evidence of substance, it cannot be said the evidence compels a different result. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). The ALJ, as fact finder, has the sole authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985).

The evidence before the ALJ indicated that although Olson was injured on May 22,

> 1996, she continued to work in her normal and customary job position until she voluntarily resigned in January 1998. Dr. Shea assessed no impairment attributable to Olson's neck, shoulder, arms, and hands. Furthermore, he made no reference that any impairment rating assessed to her low back condition was in accordance with the AMA Guides. Dr. Guarnaschelli likewise expressed no opinions with regard to work restrictions. Only Dr. Hargadon assessed an AMA impairment rating. However, he, too, prescribed no restrictions with regard to Olson's ability to perform her occupational duties.
>
> Since the ALJ is entitled to draw all reasonable inferences from the evidence, we conclude that it was within his discretion to conclude that Olson retains the capacity, even after her injury, to return to work at an equal or greater wage than her pre-injury wage. Jackson v. General Refractories Company, Ky., 581 S.W.2d 10 (1979). We also hold that the ALJ's rejection of Dr. Shea's impairment rating and conclusion that Olson's alleged lumbar complaints are not work related is reasonable and supported by the evidence.
>
> Where the evidence is conflicting, the ALJ may choose whom and what to believe. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977). The ALJ may choose to believe parts of the evidence and disbelieve other parts, even when it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). Furthermore, this Board may not substitute its judgment for that of the ALJ in matter involving the weight to be afforded the evidence in questions of fact. See KRS 342.285(2).

We agree with the Board's discussion quoted above and adopt it as our own. We also believe the Board's reasoning is supported by recent case law.[4] This Court in Ashland Exploration

[4] See also Whittaker v. Johnson, Ky., 987 S.W.2d 320 (1999); and Whittaker v. Robinson, Ky., 981 S.W.2d 118 (1998).

Inc. v. Tackett,[5] observed that "[a]s with other 1994 amendments to the Act, KRS 342.730(1)(b) was aimed at curbing economic abuses of the workers' compensation system. Thus, the Legislature intended to limit the amount of workers' compensation benefits an able-bodied claimant may receive if he, at least, returns to work at his pre-injury wages and is physically capable of remaining in the job he returns to permanently or indefinitely." In Tackett, the claimant initially returned to work after his injury at the same wage, but "he ultimately had to retire because he could no longer physically handle the job." Unlike Mr. Tackett, the ALJ in the case sub judice did not find that Ms. Olson had to retire because she could no longer physically handle the job; and the evidence does not compel such a finding.

Accordingly, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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R. Scott Borders
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BRIEF FOR APPELLEE, SPECIAL FUND:

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[5]Ky.App., 971 S.W.2d 832, 834 (1998).