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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-001070-WC

BOYD FELTNER APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-01247

RICHARD D. VANDUZER;
UNINSURED EMPLOYERS' FUND;
A. THOMAS DAVIS,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER,[1] JUDGE; HUDDLESTON AND PAISLEY, SENIOR JUDGES.[2]

HUDDLESTON, SENIOR JUDGE: Boyd Feltner petitions for review of an opinion of the Workers' Compensation Board that affirmed an Administrative Law Judge's decision that awarded Richard D. Vanduzer permanent partial occupational disability benefits.[3]

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[1] Judge David A. Barber concurred in this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

[2] Senior Judges Joseph R. Huddleston and Lewis G. Paisley sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

[3] The Uninsured Employers' Fund was added as a party in the administrative proceeding because Feltner has no workers' compensation insurance coverage. The Uninsured Employers' Fund has not filed an appellate brief.

Feltner disputes the ALJ's findings that Vanduzer was his employee and that Vanduzer had an average weekly wage of $250.00.

In June 2003, Raymond Kilburn, who had known Boyd Feltner since the 1970s, contracted with Feltner for the construction of a "pole or auction barn," in part because of Feltner's experience in construction and concrete work. Kilburn contracted to pay Feltner $13,005.00 and provide the building materials. Kilburn, together with his son, Dwight, and his son-in-law, assisted in constructing the building. Feltner worked on the building until September 2003.

On July 25, 2003, Vanduzer sustained bilateral wrist fractures when he allegedly fell from a ladder while working on the auction barn. He was taken to the Hazard Appalachian Regional Hospital, where Dr. Mukut Sharma diagnosed a grade one open comminuted fracture at the lower end of the left radius and a closed displaced fracture at the lower end of the right radius. Dr. Sharma operated on Vanduzer the same day, with placement of bilateral external fixative devices and application of a MIG bone graft at the left wrist. Subsequently, Vanduzer decided to consult Dr. Amit Gupta at Kleinert, Kutz and Associates Hand Care Center in Louisville. Dr. Gupta performed revision surgery on August 4, 2003, removing the external fixator from the right wrist and placing the wrist in a cast.

He also inserted volar radial plating on the left wrist. Vanduzer continued to see Dr. Gupta for several months. He continues to complain of pain and numbness in both wrists.

On July 20, 2004, Vanduzer filed his Application for Resolution of Injury Claim with the Board stating that he had sustained his wrist injury while working as a carpenter for Boyd Feltner. He also claimed that he had a weekly wage of $250.00 at the time of the injury. On September 17, 2004, Feltner responded to the notice of claim denying that Vanduzer was his employee on the date of the injury.

On August 28, 2004, Dr. O.M. Patrick conducted a functional evaluation examination and assessed a 43% whole body impairment due to loss of motion and strength in both wrists. On July 28, 2005, Dr. Gregory Gleis performed an independent medical examination of Vanduzer. Dr. Gleis assessed a 19% whole body impairment rating and opined that Vanduzer could not return to work as a carpenter because of limitations in using his hands for repetitive forceful activity. Dr. Gleis was critical of Dr. Patrick's methodology in assessing the impairment rating.

On August 18, 2005, the ALJ conducted a hearing at which Vanduzer and Feltner testified. The parties also submitted the depositions of Raymond Kilburn; Dwight Kilburn; Chester Feltner, Boyd Feltner's son; Thomas Teague, an acquaintance of Felter; Barbara Taylor, an acquaintance of

Vanduzer; and the prior depositions of Vanduzer and Feltner. Vanduzer also introduced telephone records from 2002 showing telephone calls between him and Feltner, and Feltner submitted his telephone records for three months in 2003.

Vanduzer testified that he had worked for Feltner in 2002 in Lexington and that Feltner had hired him in early summer of 2003 to work as a carpenter on the Kilburn building. He stated that he was paid weekly in cash at the rate of $8.00 per hour and typically worked 40 hours per week depending on weather conditions. Vanduzer indicated that Feltner, Raymond Kilburn, and Chester Kilburn were present at the time of his accident and that Feltner dropped him off at the hospital. Vanduzer stated that Feltner would use the telephone to contact him about the work schedule.

Boyd Feltner denied having hired Vanduzer to work on the Kilburn building. Feltner stated that he only knew Vanduzer by another name when both were employed by a concrete company sometime in 2001. Feltner denied having had any personal contact, including telephone calls or conversations, with Vanduzer in 2002 or 2003. In his deposition, Feltner reiterated that he had not hired Vanduzer and the only persons who worked on the auction barn were Raymond Kilburn and his two helpers. He indicated that he first heard of the incident when someone from the Office of Workers' Claims contacted him.

In her deposition, Barbara Taylor said she became acquainted with Vanduzer because her son and Vanduzer's step-son were in Headstart pre-school together and Vanduzer had done some odd jobs for her. Taylor testified that she had visited Vanduzer on the jobsite for the Kilburn building and had visited him in the hospital following the accident in July 2003. Taylor stated that Vanduzer told her that he was working for Feltner and that Feltner took him to the hospital after he was injured.

Raymond Kilburn testified in his deposition that he hired Feltner to work on and oversee construction of the auction barn. He said that he did not know Vanduzer and that he, his son, and his son-in-law were the only other persons who worked on the project, but admitted that they usually worked later in the day after Feltner had left the site. Kilburn said he paid Feltner on an irregular basis by check. Finally, he denied knowing that anyone had been injured on the job site. Dwight Kilburn's deposition testimony supported his father's testimony. In his deposition, Thomas Teague testified that he had employed Vanduzer for a few weeks in 2001 before firing him. Teague also stated that he had known both Feltner and Raymond Kilburn for several years and had never known about either having employed Vanduzer.

On October 10, 2005, the ALJ handed down an opinion finding an employment relationship between Vanduzer and Feltner.

The ALJ awarded Vanduzer permanent partial disability benefits based on a 19% whole person permanent partial impairment, an average weekly wage of $250.00, and a multiplier under KRS 342.730 (1)(k) because Vanduzer cannot return to the same type of work that he was performing at the time of his injury. Feltner's petition for reconsideration was denied. On April 14, 2006, the Board affirmed the ALJ's decision. This appeal followed.

In a workers' compensation action, the employee bears the burden of proving every essential element of a claim.[4] As the fact-finder, the ALJ has the authority to determine the quality, character, and substance of the evidence.[5] Similarly, the ALJ has the sole authority to determine the weight to be given to and the inferences to be drawn from the evidence.[6] The ALJ as fact-finder also may reject any testimony and believe or disbelieve various parts of the evidence even if it came from the same witness.[7] The claimant has the burden of establishing the existence of an employment relationship, but once he

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[4] *Lane v. S & S Tire, Inc. No. 15*, 182 S.W.3d 501, 505 (Ky. 2005); *Burton v. Foster Wheeler Corp.,* 72 S.W.3d 925, 928 (Ky. 2002); *Gibbs v. Premier Scale Co./Indiana Scale Co.,* 50 S.W.3d 754, 763 (Ky. 2001).

[5] *Garrett Mining Co. v. Nye*, 122 S.W.3d 513, 518 (Ky. 2003); *Square D Co. v. Tipton,* 862 S.W.2d 308, 309 (Ky. 1993).

[6] *Miller v. East Kentucky Beverage/Pepsico, Inc.,* 951 S.W.2d 329, 331 (Ky. 1997); *Carnes v. Parton Bros. Contracting, Inc.,* 171 S.W.3d 60, 66 (Ky. App. 2005).

[7] *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000); *Whittaker v. Rowland*, 998 S.W.2d 479, 481 (Ky. 1999).

introduces competent evidence of probative value, the ALJ may accept it.[8] When the ALJ's decision favors the party with the burden of proof, the issue on appeal is whether the ALJ's decision is supported by substantial evidence, that is, evidence of substance and consequence sufficient to induce conviction in the minds of reasonable people.[9] The ALJ has broad discretion in determining the extent of occupational disability.[10]

A party challenging the ALJ's factual finding, as Feltner does, must do more than present some evidence supporting a contrary conclusion to justify reversal.[11] Upon review of the Board's decision, our function is limited to correcting the Board only in those instances where we perceive that "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."[12]

Feltner raises two issues on appeal by challenging the ALJ's findings on the existence of an employment relationship and the assessment of a $250.00 average weekly wage. The

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[8] *Uninsured Employers' Fund v. Brewster*, 818 S.W.2d 602, 605 (Ky. 1991).

[9] *Transportation Cabinet, Department of Highways v. Poe*, 69 S.W.3d 60, 62 (Ky. 2001); *Whittaker*, *supra,* note 6 at 481.

[10] *Cal Glo Coal Co. v. Mahan*, 729 S.W.2d 455, 458 (Ky. App. 1987); *Thompson v. Fischer Packing Co.*, 883 S.W.2d 509, 511 (Ky. App. 1994).

[11] *Poe*, *supra,* note 8 at 62; *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000).

[12] *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992). *See also McNutt Construction v. Scott*, 40 S.W.3d 854 (Ky. 2001); *Butler's Fleet Service v. Martin*, 173 S.W.3d 628, 631 (Ky. App. 2005).

primary issue in this appeal involves the finding that Vanduzer was employed by Feltner to work on the auction barn at the time of his injury. There was conflicting, indeed diametrically opposed, evidence on this issue. The ALJ analyzed this issue as follows:

> [Vanduzer] has testified to severe memory problems. The ALJ is persuaded that [Vanduzer's] work history made of record is suspect or incomplete. The record suggests the possibility that [Vanduzer] spent a portion of his employment life in illegal activities. The ALJ believes that though the legal requirements of notice are met, many problems of this case were caused because [Vanduzer] did not contact Boyd Feltner after the injury.
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> In this case it is determined that the material facts have more weight and are more credible than the testimony. Material facts include medical records that [Vanduzer] suffered a severe injury and phone records. It is alleged that [Vanduzer] injured both arms and wrists when he fell from a 12-foot ladder.
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> The ALJ believes that the viability of [Vanduzer's] case turns on the implications from [Feltner's] home telephone records. Less than a month before [Vanduzer's] severe injury, calls were made from [Feltner's] home to the home of [Vanduzer's] girlfriend. This tends to discredit several of [Feltner's] contentions.
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> Telephone records of [Vanduzer] and [Feltner] were filed into evidence. The telephone records submitted by [Vanduzer] were from 2002, and the records from 2003 were unobtainable. From April to June, 2002, [Vanduzer] called [Feltner]

approximately 24 times. [Feltner's] telephone records from 2003 were filed. The best interpretation of the evidence is that [Feltner] called [Vanduzer] on two occasions less than one month before the injury. Though it is credible that [Feltner] was not familiar with the name under which [Vanduzer] brought his claim, it was the general thrust of [Feltner's] defense that he had no or very minimal contact with [Vanduzer] before the injury and thereafter until this claim was filed. [Feltner's] contention that [Vanduzer] did not work for him and that [Feltner] did not know [Vanduzer], when examined in light of the telephone evidence and other evidence and testimony in the record, is not credible.

When the evidence is examined in this light, it becomes apparent that an employment relationship existed between [Vanduzer] and [Feltner]. Barbara Taylor, a guardian or fiduciary of [Vanduzer] testified that she did see [Vanduzer] working at the site, and she knew that they were working on a "pole barn," which the owner of the property, Mr. Kilbourne (sic)[13] verified. She also witnessed [Vanduzer] being paid in cash. It was customary for an employee in a position such as [Vanduzer's] to be paid in cash. [Vanduzer's] former employer, Mr. Teague, admitted that he also paid in cash. The ALJ believes the best evidence is that [Vanduzer] was paid in cash by [Feltner] at a rate of $8.00 an hour.

[Vanduzer] has a history of irresponsibility that has affected the presentation of his case. Nevertheless, [Feltner's] admitted inconsistency in his testimony makes [Feltner] a less believable witness on certain issues.

[13] The correct spelling is Kilburn.

> [Feltner] has supplied several corroborating witnesses, but the ALJ believes that they are not impartial witnesses. The sons of [Feltner] and of Mr. Kilbourne (sic), the building owner, testified that [Vanduzer] was not an employee. However, they were not at the job site on a regular basis. They could not know if someone else was there working. The ALJ believes [Vanduzer] was an employee of [Feltner] on the date of his injury. [Vanduzer] was performing his job when he was required to climb a 12-foot ladder. He was at the top of the ladder when it slipped and fell, taking him down with it. He landed on concrete on his arms, which caused him to break both of his wrists. He immediately went to the emergency room, and underwent surgery later that same day.

On appeal, Feltner contends the ALJ's decision is not supported by substantial evidence. Feltner points to several apparent inconsistencies and contradictions in Vanduzer's testimony including his work history and his use of aliases. Feltner also notes that Vanduzer failed to produce evidence in his control that he initially agreed to provide. He contends that Barbara Taylor was biased and her testimony conflicted with Vanduzer's testimony as to his work history.

The record indicates that much of the testimony of the witnesses is in direct conflict. The ALJ acknowledged the inconsistent and contradictory aspect of the evidence presented by Vanduzer and major conflicts in the testimony. As a result, he relied heavily on the documentary evidence contained in the telephone records to assess the credibility of the witnesses.

The ALJ determined that the telephone records impugned Feltner's testimony that he only knew Vanduzer by another name, that he had had no contact with Vanduzer for several years prior to the accident, and that Vanduzer was not working with Feltner in July 2003. Feltner criticizes the ALJ's reliance on the two short telephone calls from Feltner to Vanduzer's number on July 2, 2003, arguing that at that time Vanduzer allegedly had separated from his ex-wife and was not living at the address where the telephone was located. Feltner also states the "two calls were made within a two-minute period and were of such a short duration as to preclude any inference that any conversation actually took place." Regardless of whether Feltner actually spoke with Vanduzer, the fact that Feltner made a telephone call to the telephone used by Vanduzer suggests some intent by Feltner to attempt to contact Vanduzer and clearly undermines his testimony. We agree with the Board that the ALJ's decision to discredit Feltner's testimony was based on reasonable inferences drawn from the evidence.

The ALJ also gave greater weight to Vanduzer's corroborating witness than Feltner's witnesses. He noted that Barbara Taylor's testimony was consistent with that of Thomas Teague and Raymond Kilburn; whereas, Kilburn admitted that he worked on the barn primarily late in the day after Feltner had

left, so he would have been less likely to see Vanduzer at the worksite.

The ALJ is authorized to assess the credibility of the witnesses and assign the weight accorded the evidence. His analysis properly accounted for the discrepancies in the testimony and drew reasonable inferences from the documentary evidence. In sum, the ALJ's finding of an employment relationship between Feltner and Vanduzer was supported by substantial evidence.

Feltner also challenges the ALJ's finding that Vanduzer earned an average weekly wage of $250.00. He claims that Vanduzer failed to provide any evidence to support his claim on wages and that the evidence suggests that Vanduzer was only a seasonal employee. Feltner points out that Vanduzer did not submit any tax returns and had no IRS W2 or 1099 forms to verify his wages.

As the claimant, Vanduzer had the burden of proving each and every element of his claim including his average weekly wage.[14] Vanduzer testified that he was paid $8.00 per hour on this job and generally worked a 40-hour week, depending on weather conditions, which results in a weekly wage of $320.00. His failure to provide tax records is understandable given the common practice of paying persons in construction, especially on

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[14] *See Fawbush v. Gwinn*, 103 S.W.3d 5, 10 (Ky. 2003).

jobs of short duration, in cash, which Vanduzer claimed occurred with Feltner. Teague testified that he paid Vanduzer $9.00-$10.00 per hour in cash when Vanduzer worked for him. Despite the lack of hard documentary evidence on Vanduzer's wage history, the ALJ's calculation of $250.00 as the average weekly wage represented a realistic estimation under the circumstances.

Additionally, Feltner's assertion that Vanduzer should be considered a "seasonal employee" was properly rejected by the Board. While judicial review of an ALJ's decision on factual issues is limited, statutory interpretation is a question of law subject to *de novo* review and the courts are not bound by the Board's interpretation of a statute.[15] The cardinal rule of statutory interpretation is to ascertain and give effect to the statute's intent.[16] The policy and purpose of a statute should be considered from a review of the entire statute in determining the meaning of the words used.[17]

Generally, average weekly wage for workers employed for a short period of time is calculated based on earnings over

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[15] *See AK Steel Corp v. Childers,* 167 S.W.3d 672, 675 (Ky. App. 2005); *Hall's Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327, 330 (Ky. App. 2000).

[16] *Hale v. Combs*, 30 S.W.3d 146, 151 (Ky. 2000); *Magic Coal Co. v. Fox*, *supra,* note 6, at 94.

[17] *Bowling v. Lexington-Fayette Urban County Gov't*, 172 S.W.3d 333, 341 (Ky. 2005); *Cabinet for Families and Children v. Cummings*, 163 S.W.3d 425, 430 (Ky. 2005).

a 13-week period.[18] However, average weekly wage is determined based on a different formula for seasonal employees. KRS 342.140(2) provides that "[i]n 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."

In *Department of Parks v. Kinslow*,[19] which involved a general maintenance worker at a state park who worked from April to October but not the rest of the year, the Supreme Court indicated that the apparent intent of the statute was to reduce a worker's recovery if the employment was "with a business that carried on naturally for only a particular season of the year,"[20] so that seasonal workers should not receive the same level of benefits as a year-round worker. In *Travelers Ins. Co. v. Duvall*,[21] the Supreme Court held that work performed by a paving company employee was not seasonal despite the fact that filling pot-holes was affected by the weather, especially during the winter months, because the employee performed other services in

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[18] *See* KRS 342.140(1)(e).

[19] 481 S.W.2d 686 (Ky. 1972).

[20] *Id.* at 688.

[21] 884 S.W.2d 665 (Ky. 1994).

the winter and other paving companies worked year-round. Finally, in *Desa International, Inc. v. Barlow*,[22] the Supreme Court found that KRS 342.140(2) applied to a worker who worked only seven to eight months a year for a manufacturer of residential heating units that shut down for the remainder of the year. The Court stated that "[t]he purpose of KRS 342.140 is to determine a given worker's wage-earning capacity so that the resulting income benefit will be based upon a realistic estimation of what the worker would have expected to earn had the injury not occurred."[23] The Court concluded that an employee whose job involved only seven to eight months of work per year would not earn as much as a year-round worker and should not receive the same level of disability benefits.

Vanduzer was working as a framing carpenter on the auction barn at the time of his injury. He testified that he worked a variety of jobs primarily in construction and carpentry, and that he generally stayed employed throughout most of the year. Despite the paucity of documentary evidence concerning Vanduzer's work-history, he need not be characterized as a seasonal employee under KRS 342.140(2). Although construction and carpentry work is affected by the weather, it generally is performed year-round and includes duties that can

[22] 59 S.W.3d 872 (Ky. 2001).

[23] *Id.* at 875.

be performed inside during the winter months. Also, Vanduzer did work throughout the year performing handyman jobs as well as traditional construction work. While Vanduzer's employment may have been intermittent, it was not restricted to a particular portion of the year. Under these facts, the policy of reducing the compensation for a seasonal employee is not appropriate in this case.

Because the Board did not overlook or misconstrue controlling statutes or err in assessing the evidence so as to cause gross injustice, its opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Stephen N. Calvert Compton, Kentucky	McKinnley Morgan MORGAN, MADDEN, BRASHEAR & COLLINS London, Kentucky