RENDERED: APRIL 13, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002013-WC

R&L CARRIERS — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-78593

DONALD E. GREGORY, JR.;
HOWARD FRAISER, ADMINISTRATIVE
LAW JUDGE; WORKERS' COMPENSATION
BOARD — APPELLEES

AND

NO. 2006-CA-002179-WC

DONALD E. GREGORY — CROSS-APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-78593

R & L CARRIERS;
HOWARD FRAISER, ADMINISTRATIVE
LAW JUDGE; WORKERS' COMPENSATION
BOARD — CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: WINE, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.[1]

BUCKINGHAM, SENIOR JUDGE: R & L Carriers petitions and Donald E. Gregory cross-petitions from an opinion of the Workers' Compensation Board (Board) affirming in part and reversing and remanding in part an order of an administrative law judge (ALJ). The Board upheld the ALJ's findings of fact, conclusions of law, and award of worker's compensation benefits, except that it reversed the ALJ's denial of the multipliers contained in Kentucky Revised Statute (KRS) 342.730(1)(c)1 and KRS 342.730(1)(c)3 for the psychological impairment associated with Gregory's work-related accident, and remanded for a recalculation of benefits to include application of the multipliers to the psychological impairment. For the reasons stated below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Gregory was hired by R & L in October 2001 as a part-time laborer. Two or three months later, he was assigned to the position of forklift driver. On July 12, 2002, while turning the forklift, the vehicle flipped and landed on his right foot, severely injuring it. Eventually, the majority of Gregory's right foot was amputated. There

[1] Senior Judges David C. Buckingham and Michael L. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

followed a period of unsuccessful attempts to fit a functional prosthesis to Gregory's foot, which, ultimately, was successfully resolved.

On April 14, 2004, Gregory filed a Form 101 seeking workers' compensation benefits pursuant to KRS Chapter 342. On October 11, 2004, the ALJ entered an Opinion and Award awarding Gregory temporary total disability (TTD) benefits "until such time as [Gregory] has been fitted with a workable prosthesis and reaches MMI [maximum medical improvement]." On August 1, 2005, after retaining new counsel, Gregory attempted to amend his complaint to include the allegation of safety violations by R & L which, if established, would entitle Gregory to a 30% benefit enhancement pursuant to KRS 342.165. However, the ALJ denied the amendment as untimely.

Following discovery and a hearing the ALJ entered an Opinion and Award awarding Gregory permanent partial disability benefits at the rate of $150.87 per week for a period of 425 weeks. The award did not apply the multipliers contained in KRS 342.730(1)(c)1 and KRS 342.730(1)(c)3 for the psychological impairment associated with the accident. R & L appealed and Gregory cross-appealed to the Board.

On August 25, 2006, the Board entered an opinion upholding the ALJ's findings of fact, conclusions of law, and award of worker's compensation benefits, except that it reversed the ALJ's denial of the multipliers contained in KRS 342.730(1)(c)1 and KRS 342.730(1)(c)3 for the psychological impairment associated with the work-related

accident, and remanded for a recalculation of benefits to include application of the multipliers to the psychological impairment. These petitions for review followed.

STANDARD OF REVIEW

We begin by noting our standard of review. First, we give broad deference to the ALJ's factual findings. "The ALJ, as the finder of fact, and not the reviewing court, has the sole authority to determine the quality, character, and substance of the evidence." *Square D Co. v.. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S .W.2d 329, 331 (Ky. 1997). The ALJ, as fact-finder, may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. *Magic Coal v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000) . Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. *Whittaker v. Rowland,* 998 S.W.2d 479, 482 (Ky. 1999). And, as always, our review of questions of law is de novo. *Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth, Transportation Cabinet*, 983 S.W.2d 488, 490 (Ky. 1998)

Our function in reviewing the Board's decision "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 Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

PETITION 2006-CA-002013-WC

We first consider the issues raised by R&L Carriers in its petition for review.

KRS 342.730(1)(c)1 3X MULTIIPLIER

The ALJ determined that Gregory had an 18% physical disability rating and a 10% psychiatric disability rating. Based upon the 18% disability impairment alone, the ALJ determined that Gregory did not have the capacity to return to his job as a forklift operator. The ALJ further determined, however, that the psychiatric impairment alone would not prevent Gregory from returning to his former job. Based upon this, the ALJ applied the 3x multiplier contained in KRS 342.730(1)(c)1 and 1.2x multiplier enhancement contained in KRS 342.730(1)(c)3 to the benefits associated with the foot impairment, but not the psychological impairment. The ALJ explained his reasoning as follows:

> In regard to the application of [the] three multiplier, the undersigned finds that the Plaintiff has not provided any medical or psychological evidence that he lacks the physical capacity to return to his prior position as a result of his psychiatric impairment, particularly since he now has a workable prosthesis. The undersigned finds the opinion of Dr. Granacher to be more credible that the Plaintiff's psychological impairment does not impact his ability to perform his prior job. While the undersigned understands why an individual would not want to operate a forklift again after having part of his foot amputated, no medical professional has opined that Mr. Gregory cannot physically perform such a position as a result of his psychological impairment.

In summary, the ALJ concluded that the 3x multiplier contained in KRS 342.730(1)(c)(1) should not be applied to the benefits attributable to Gregory's psychological impairment because that impairment, standing alone, would not have prevented Gregory from returning to his job as a forklift operator. The Board disagreed with the ALJ's interpretation of KRS 342.730(1)(c)(1) and remanded for application of the multiplier to the psychological impairment as well.

KRS 342.730(1)(c)(1) provides as follows:

> If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments;

KRS 342.0011(1) defines "injury" as follows:

> "Injury" means any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. . . .. "Injury" . . . . shall not include a psychological, psychiatric, or stress-related change in the human organism, unless it is a direct result of a physical injury.

Thus, the term "injury" refers to the traumatic event or series of events that causes a harmful change rather than to the harmful change itself. *Lexington-Fayette Urban County Government v. West*, 52 S.W.3d 564, 566 (Ky. 2001). Therefore, for purposes of the 1996 version of KRS 342.0011(1), a "physical injury" is an event that involves physical trauma and proximately causes a harmful change in the human

organism that is evidenced by objective medical findings. *Id.* An event that involves physical trauma may be viewed as a "physical injury" without regard to whether the harmful change that directly and proximately results is physical, psychological, psychiatric, or stress-related. *Id.* But in instances where the harmful change is psychological, psychiatric, or stress-related, it must directly result from the physically traumatic event. *Id.* As further discussed elsewhere in this opinion, the ALJ determined that Gregory's psychological injury was directly related to his physical injury, and we affirm this finding herein. Thus, his psychological injury is on equal basis with his foot injury for all relevant purposes.

Because Gregory's psychiatric impairment was a direct result of his physical injury, the "harmful change" in the present case was both the foot impairment and the psychiatric impairment. Therefore, the "injury" in the present case, as defined in KRS 342.0011(1), is both the foot impairment and the psychiatric impairment. The plain language of KRS 342.730(1)(c)(1) provides that the multiplier is to be applied to the "injury." Hence, we agree with the Board that the multiplier should be applied to the psychological trauma associated with the work-related injury. In addition, we adopt the following discussion by the Board:

> The Act defines "permanent disability rating" as the "permanent impairment rating selected by an administrative law judge times the factor set forth in the table that appears at KRS 342.730(1)(b)" and defines "permanent impairment rating" as the "percentage of whole body impairment caused by the injury" as determined by the AMA *Guides*, latest available edition. KRS 342.0011(35) and KRS 342.0011(36).

Thus, by definition and in accordance with existing authority, partial disability resulting from a single traumatic event must be measured by the sum of the injured worker's whole-body impairment flowing from the event, thereby compensating the injured worker for the full occupational effect of all harmful changes caused by the event. In order to reflect accurately the injured worker's level of permanent partial disability, all impairment flowing from a single work-related event must, in accordance with the express language of the statute, be combined into a single rating regardless of whether different body parts are involved.

Where various injuries producing different whole-body impairment ratings occur as a result of successive and distinct work-related traumatic events, the disability ratings pursuant to KRS 342.730(1)(b) for those injuries must be calculated separately. *Moore v. Pontiki Coal Corp.*, 2001-SC-0089-WC (rendered October 25, 2001, and designated not to be published.) However, where the harmful changes in question trace their chain of causation to a single work-related event, the ALJ is directed to combine the various impairment ratings produced by the event into a single whole-body impairment rating, and then calculate the appropriate disability rating using that single whole-body impairment rating in accordance with KRS 342.730(1)(b). *Thomas v. United Parcel Service*, 58 S.W.3d 455, 458-459 (Ky. 2001).

The ALJ is to utilize the combined values chart provided in the AMA Guides to arrive at the single whole-body impairment rating. *Cf. Caldwell Tanks v. Roark*, 104 S.W.3d 753 (Ky. 2003) (holding that administrative law judge should have utilized table in the AMA Guides to convert percentage of binaural hearing impairment into whole-body impairment rating, as such requires no medical expertise); *Gamco Products v. George*, 2003-CA-001270-WC (rendered October 24, 2003 and designated not to be published) (relying on *Caldwell Tanks v. Roark*, *supra*, court of appeals held that administrative law judge should have used combined values chart to determine percentage of whole-body impairment resulting from impairments of the left knee and low back).

In summary, the ALJ erred in its treatment of Gregory's psychiatric impairment. Thus, the Board correctly reversed and remanded on this issue for the calculation of an award based on a disability rating using the combined value of his 18% physical and 10% psychiatric impairments, and for a recalculation of benefits based upon the multiplier contained in KRS 342.730(1)(c)1 and the multiplier enhancement contained in KRS 342.730(1)(c)3.

PSYCHOLOGICAL IMPAIRMENT RATING

R & L contends that the ALJ erred by assigning Gregory a 10% psychological impairment rating rather than a 5% rating. This argument is founded upon the theory that because the ALJ accepted Dr. Granacher's finding of an overall 10% psychological impairment rating, it was improper for the ALJ to at the same time disregard Granacher's conclusion that half of that rating was preexisting and attributable to pre-accident factors relating primarily to Gregory's girlfriend's pregnancy and her telling him she had aborted the child, when, in fact, she had not. The ALJ explained his decision to reject Dr. Granacher's pre-existing condition opinion as follows:

> On the other hand, the undersigned finds more credible the opinions of Dr. Wagner and Dr. Underwood that all of Mr. Gregory's psychiatric impairment is due to the work injury. While the undersigned does not doubt that the events surrounding the Plaintiff's decision to quit school were stressful, he had absolutely NO prior counseling or treatment or any record of a diagnosis of anxiety or depression. Further, it does not even seem logical to give equal weight to a few months of non-physical stressor and to an amputation of a majority of a foot, particularly when considered with the difficulties in obtaining a workable prosthesis.

> In addition, there is absolutely no evidence that any psychological symptoms, if any, that may have existed when the Plaintiff was in the 10th grade remained active up to the time of the injury on July 12, 2002. Dr. Granacher did NOT opine that the Plaintiff had unresolved, preexisting active psychological impairment at the time of his injury to his right foot. The causal event for the Plaintiff's need for psychological treatment was the injury and resulting amputation.

As previously noted, the ALJ, as fact-finder, may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. *Magic Coal*, *supra*. Upon the record as a whole, we cannot conclude that the ALJ's findings that Gregory's 10% psychological impairment was wholly related to the accident and that none of the impairment was related to a pre-existing condition was erroneous. The ALJ's finding is supported by substantial evidence. As such, we will not disturb the ALJ's rejection of R & L's contention that one-half of the impairment is related to factors unassociated with the accident.

PHYSICAL CAPACITY - 3X MULTIPLIER

Next, R & L contends that "the undisputed medical evidence demonstrates that Gregory had the physical capacity to return to his pre-injury job (driving a forklift) and is not entitled to a 3x multiplier" as contained in KRS 342.730(1)(c)1. We disagree.

Gregory's testimony alone, that he is unable to operate a forklift because of a lack of feeling in the prosthesis in the right foot; that he cannot operate a forklift with his left foot alone; and that he needs both feet to operate the forklift is substantial

evidence supporting this finding. *See* C*ommonwealth, Transportation. Cabinet v. Guffey*, 42 S.W.3d 618, 621 (Ky. 2001) (A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured). In addition, we adopt the Board's discussion of the issue:

> To describe the medical evidence as "undisputed" misrepresents the matter.
>
> The report on which R & L relies is the August 3, 2004, report of Dr. Sheridan in which he conjectures, "I think that if [Gregory] got an appropriate prosthetic device, the work restrictions that I allocated to him would be lifted." R & L characterizes this as a "clarification" of Dr. Sheridan's earlier report, in which he declared Gregory to be at MMI and recommended "permanent work restriction" of no standing or walking more than 45 minutes; no climbing, squatting, crouching, crawling, kneeling, or walking on irregular ground; and no lifting, pushing or pulling anything greater than 15 pounds frequently and 20 pounds infrequently. There was nothing in Dr. Sheridan's original report to indicate that these restrictions were temporary or conditioned upon Gregory's lack of an appropriate prosthetic device. Indeed, Gregory had just received a new prosthesis days before his evaluation by Dr. Sheridan, which is noted in the physician's report. It seems most reasonable to conclude that Dr. Sheridan would have accounted for Gregory's new prosthesis, which was assumed at the time to be workable, in making his assessment of Gregory's physical capacity. Dr. Sheridan certainly gave no indication in his original report that the prosthesis with which Gregory presented at the time of his evaluation was not appropriate. In short, Dr. Sheridan's subsequent "clarification" of his opinion on restrictions might reasonably be considered suspect by the ALJ. That being said, the ALJ's stated basis for discounting Dr. Sheridan's later opinion regarding restrictions is that said opinion is contingent upon Gregory's having an "appropriate" prosthesis. It is reasonable for the ALJ to infer that, by "appropriate," Dr. Sheridan meant a device in which Gregory is able to perform the various functions previously restricted

by Dr. Sheridan. It is within the ALJ's authority as fact-finder to draw reasonable inferences from the evidence. *Jackson v. General Refractories Co.*, 581 S.W.2d 10 (Ky. 1979). Gregory testified, however, that he is not able to perform those functions.

Even with a working prosthesis, Gregory is unable to stand or walk for extended distances or periods of time. He explained that a trip to Wal-Mart is enough to cause "pretty good pain." By the time he exits the store, he "can't wait to get to the car and sit down and really get home and take [his] brace off." He is able to drive a car with his left foot, but does not think he would be able to operate a forklift in the same manner. He noted that the driver has to get on and off the forklift frequently to help the checker, and this would be problematic for him. Their terminal manager for R & L in Lexington, Wade Reed, confirmed that the forklift operator would be off the forklift about 20% of the time, assisting the checker with lifting boxes, both light and heavy, and maneuvering drums weighing up to 500 pounds. Gregory testified that he does not believe he could go back to any of the jobs he has held in the past, because of limitations on his ability to stand and lift. He explained that all of his past employment has required "heavy lifting."

It is well-established that a worker's own testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after his injury. *Commonwealth of Kentucky, Transportation Cabinet v. Guffy*, 42 S.W.3d 618 (Ky. 2001); *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000); *Ruby Construction Company v. Curling*, 451 S.W.2d 610 (Ky. 1970); *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979). Here, the ALJ was persuaded by Gregory's testimony regarding the physical requirements of the job he was performing for R & L at the time of his injury and his inability post-injury to perform that full range of duties. The ALJ was not bound to accept the opinions of those physicians who optimistically speculated that, with a working prosthesis, Gregory could return to work without restrictions (Dr. Sheridan) or could "possibly" return to driving a forklift (Dr. Mook). As noted by the ALJ, none of these physicians

actually evaluated Gregory after he was fitted with his latest prosthesis.

The ALJ placed credence in Gregory's testimony that, while the prosthesis is workable, it has not allowed him to recover his pre-injury level of functioning. Gregory's testimony alone meets the standard for "substantial evidence." There being substantial evidence to support the ALJ's determination, we may not disturb his decision on appeal. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). Accordingly, as to the ALJ's application of the 3.2 multiplier, we affirm.

VOCATIONAL BENEFITS

KRS 342.730(1)(c)3 provides as follows:

> Recognizing that limited education and advancing age impact an employee's post-injury earning capacity, an education and age factor, when applicable, shall be added to the income benefit multiplier set forth in paragraph (c)1. of this subsection. If at the time of injury, the employee had less than eight (8) years of formal education, the multiplier shall be increased by four-tenths (0.4); if the employee had less than twelve (12) years of education or a high school General Educational Development diploma, the multiplier shall be increased by two-tenths (0.2); if the employee was age sixty (60) or older, the multiplier shall be increased by six-tenths (0.6); if the employee was age fifty-five (55) or older, the multiplier shall be increased by four-tenths (0.4); or if the employee was age fifty (50) or older, the multiplier shall be increased by two-tenths (0.2).

Because Gregory has less than twelve (12) years of education or a high school General Educational Development diploma, he was entitled to have the multiplier contained in 342.730(1)(c)1 increased by two-tenths (0.2).

Citing *Wilson v. SKW Alloys, Inc.*, 893 S.W.2d 800 (Ky.App. 1995), R & L contends that "[i]f the Court agrees that all of the medical evidence demonstrates that the

claimant can return to his prior job as a forklift operator, the award of vocational rehabilitation was not appropriate." As discussed above, we have affirmed the ALJ's determination that Gregory is not able to return to his job as a forklift operator and, accordingly, this argument is moot.

TTD BENEFITS

Finally, R & L contends that the ALJ erred by awarding Gregory TTD benefits through February 25, 2005. R & L argues that Gregory should not have been awarded TTD benefits after February 10, 2004, because he had by then reached MMI, or, alternatively, no later than September 30, 2004, because by then he had a working prosthetic device.

The record demonstrates that following his amputation Gregory had difficulty with finding a suitable prosthesis and unsuccessfully tried several models before obtaining a suitable one. Ultimately, the ALJ determined that Gregory reached MMI and thus became ineligible for further TTD benefits, as of February 25, 2005, when Dr. Gregory released him to wear the prosthesis on a full-time basis. While there are other dates that may have been used, under facts of this case, we are persuaded that the ALJ's determination that Gregory reached MMI on February 25, 2005, was not a clearly erroneous finding. Moreover, we adopt the discussion of the Board on the issue as follows:

> Lastly, we turn to R & L's argument that the ALJ erred in awarding TTD benefits to Gregory through February 25, 2005. R & L presents this argument in multiple parts, proposing three alternative dates for the earlier termination of

TTD benefits. Obviously, the evidence on this issue is conflicting. It is of no consequence that R & L can point to other facts upon which the ALJ might reasonably have concluded that Gregory was no longer temporarily totally disabled. *Whittaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999). The question before us on appeal is whether the date selected by the ALJ is clearly erroneous on the basis of reliable, probative and material evidence contained in the whole record. *See* KRS 342.285(2)(d). A determination that is based upon substantial evidence is clearly not erroneous. *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 people. *Smyzer v. B. F. Goodrich Chemical Co*., 474 S.W.2d 367 (Ky. 1971). The ALJ's finding with respect to TTD is based on substantial evidence and comports with the statutory definition of TTD.

Pursuant to KRS 342.0011(11)(a), TTD is defined as the condition of an employee who has not reached MMI from an injury and has not reached a level of improvement that would permit a return to employment. In *Central Kentucky Steel v. Wise*, 19 S.W.3d 657, 659 (Ky. 2000), the supreme court held that, if a totally disabled worker has not reached MMI, a release to perform minimal work is not the equivalent of "a level of improvement that would permit a return to employment." The work must be "of a type that is customary or that he was performing at the time of his injury." *Id*. The court's decision, however, "does not alter the definition of total disability or stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD." *Advance Auto Parts v. Mathis*, No. 2004-SC-0146-WC, 2005 WL 119750 (rendered Jan. 20, 2005, and designated not to be published).

In *Magellan Behavioral Health v. Helms*, 140 S.W.3d 579 (Ky.App. 2004), the court of appeals weighed in on the matter, emphasizing that the two prongs of the analysis are connected by the conjunctive "and." The court explained that the second prong of KRS 342.0011(11)(a) operates to deny eligibility of TTD to individuals who, though not at MMI,

have improved enough following an injury that they can return to work. *Id.* at 581.

In the case sub judice, the ALJ found that Gregory does not retain the physical capacity to return to his customary work, a finding we have affirmed hereinabove. Thus, the question of TTD must be answered with reference to the date on which he achieved MMI. Notwithstanding R & L's argument to the contrary, the ALJ was not bound to accept Dr. Sheridan's opinion that Gregory reached MMI as of February 10, 2004. Rather, the ALJ was free to consider that the prosthesis issued to Gregory days before Dr. Sheridan's evaluation turned out to be unsuitable. Gregory wore the prosthesis for just a few days before resorting to the "shoe-n-shoe" prosthesis he had been given in 2002, which, though worn out and in need of replacement, was still the more functional of the various prostheses he had tried.

Kerr's records establish that the "shoe-n-shoe" prosthesis was replaced with a new model by January 18, 2005, and this is the next date proposed by R & L for the termination of TTD benefits. However, Kerr's records also indicate that Gregory did not begin wearing the device full-time right away. On his visit of February 25, 2005, Kerr noted that Gregory was still "progressing" and advised him at that point to "increase wearing schedule to full time wear and increase walking distance daily." Kerr scheduled another follow-up appointment with Gregory and did not finally release him "prn" [as needed] until July 28, 2005. Thus, there is also some evidence upon which the ALJ might have concluded that Gregory was not at MMI until later in the year. Nonetheless, we believe it was reasonable for the ALJ to conclude that the release to full-time use of the prosthesis corresponded with Gregory's reaching MMI and that the subsequent visits were merely for monitoring purposes. In sum, we believe that ALJ's analysis is both factually and legally sound, and affirm his award of TTD benefits.

PETITION 2006-CA-002179-WC

In his cross-petition Gregory raises the sole issue that the ALJ erred by denying his motion to amend his workers' compensation claim to include the allegation pursuant to KRS 342.165(1) that his accident was related to safety violations known to R & L. KRS 342.165(1) provides as follows:

> If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this chapter shall be increased thirty percent (30%) in the amount of each payment. If an accident is caused in any degree by the intentional failure of the employee to use any safety appliance furnished by the employer or to obey any lawful and reasonable order or administrative regulation of the executive director or the employer for the safety of employees or the public, the compensation for which the employer would otherwise have been liable under this chapter, shall be decreased fifteen percent (15%) in the amount of each payment.

Safety violations alleged by Gregory include that the forklift he was operating was in disrepair and not equipped with safety restraints; the brakes were inadequate; the tire tread was insufficient; the surface over which he was required to drive was damaged; and he was not properly trained or certified to operate the forklift.

KRS 342.210(1) provides the following in relation to workers' compensation applications:

> When the application is filed by the employee or during the pendency of that claim, he shall join all causes of action against the named employer which have accrued and which

> are known, or should reasonably be known, to him. Failure to join all accrued causes of action will result in such claims being barred under this chapter as waived by the employee.

Gregory's motion was filed during the "pendency" of his claim and is not barred by KRS 342.210(1). In support of his argument, Gregory directs our attention to Kentucky Rule of Civil Procedure (CR) 15.01, which provides as follows:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

In *Caldwell v. Bethlehem Mines Corp.*, 455 S.W.2d 67, 68-69 (Ky. 1970) the former court of appeals stated as follows:

> A court, under CR 15, has liberal discretion to allow amendments to pleadings, and is directed to give leave freely when justice so requires. . . . We would not conceive that there should be less liberality in the treatment of the rules of procedure adopted by the board for workmen's compensation cases.

Accordingly, we believe CR 15.01 provides a reliable guide upon which to review the ALJ's decision. In a trial court setting, the judge possesses broad discretion in determining whether to permit an amendment under CR 15.01. *See*, *e.g.*, *Cheshire v. Barbour*, 481 S.W.2d 274, 276 (Ky. 1972); *First National Bank of Cincinnati v.*

Hartmann, 747 S.W.2d 614, 616 (Ky.App. 1988). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004) (citation and internal quotation marks omitted).

We are unpersuaded that the ALJ abused his discretion in denying the motion to amend. The motion was filed over 13 months after the original Form 101 was filed to initiate the proceedings. The proceedings were well underway, and it appears that the principal factor which resulted in the amendment was Gregory's retention of new counsel. We are unable to conclude that the ALJ abused his discretion in denying the motion to amend.

CONCLUSION

The Opinion and Order of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David D. Black
Dinsmore & Shohl LLP
Cincinnati, Ohio

BRIEF FOR APPELLEE:

Stuart E. Alexander
Kathleen M.W. Schoen
Tilford, Dobbins, Alexander, Buckaway & Black, LLP
Louisville, Kentucky