

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000994-WC

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-69855

ROGER HUNTER; HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, DIXON, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: The Department of Highways of the Commonwealth of Kentucky Transportation Cabinet appeals from an opinion of the Workers' Compensation Board. For the reasons stated herein, we reverse and remand.

On July 11, 2006, Roger Hunter, an employee of the Kentucky Department of Highways, was injured when his foot became entangled in a hose and he fell on his shoulder and neck. Two days later, Hunter was treated by Dr. Scott Gaines who diagnosed Hunter with a significant cervical strain. However, Dr. Gaines noted that Hunter had a history of back problems.

Hunter then was examined by Dr. Oran Aaronson who recommended fusion surgery for spinal stenosis. Dr. Aaronson advised Hunter that the fusion surgery carried risks of bleeding; loss of bowel and bladder function; changes in the sensation of his extremities; paralysis; and death. Hunter was advised that the surgery might be unsuccessful in relieving his symptoms and, possibly, could make them worse. Later, Dr. Aaronson opined that Hunter had the ability to perform light activity at the light physical demand level. He further opined that Hunter's normal work life would be shortened without surgery.

Meanwhile, Hunter returned to work at his previous wage rate at the Department. Hunter then temporarily began working at a hospital where he performed minor electrical work. Later, he began working for the Kentucky Department of Agriculture as an inspector. Hunter testified that his inspector's position was a much lighter and easier job than his previous position. Hunter also earned more wages working as an inspector than he received at the Department of Highways.

On January 9, 2008, Hunter filed a claim for workers' compensation alleging cervical and shoulder injuries. After the submission of evidence, the

administrative law judge (ALJ) found that Hunter was entitled to permanent partial disability benefits for his cervical but not his shoulder injury. The ALJ found that Hunter's impairment rating was fifteen percent; that he did not retain the physical capacity to return to his previous job; and that he returned to work at a weekly wage equal to or greater than the average weekly wage at the time of his injury.

After finding that Hunter's employment status satisfied the standards of KRS 342.730(1)(c)1 and (c)2, the ALJ ruled that it was more appropriate to apply paragraph (c)2 because Hunter was unlikely to be able to continue earning a wage that equals or exceeds his wage at the time of his injury for the indefinite future. Based on this finding, the ALJ multiplied Hunter's benefits by a factor of three pursuant to KRS 342.730(1)(c)2. Following the Department's appeal, the Board affirmed and this appeal followed.

The Department contends that the Board's finding that Hunter did not retain the ability to earn a wage that equals or exceeds his pre-injury wage for an indefinite period of time was not supported by substantial evidence. Additionally, the Department contends that the Board's finding that Hunter's normal work life will be shortened, at some undetermined time, without surgery is insufficient as a matter of law to support enhancing his benefits pursuant to KRS 342.730(1)(c)1. We agree.

Our standard of review of a decision of an administrative agency is centered on the issue of arbitrariness because of our constitution's prohibition against arbitrary actions. *Com. Transp. Cabinet Dept. of Vehicle Regulation v.*

Cornell, 796 S.W.2d 591, 594 (Ky.App.1990). Under this standard, we can only reverse an administrative agency's decision "if the agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence in the record."

Lindall v. Kentucky Retirement Systems, 112 S.W.3d 391, 394 (Ky.App. 2003).

Substantial evidence means "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens-Corning Fiberglass Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

KRS 342.730(1)(b) establishes a method for calculating the income benefits for permanent partial disability recipients where benefits are the product of the worker's average weekly wage, AMA impairment, and a statutory factor.

Under KRS 342.730(1)(c), the legislature established a method for awarding enhanced benefits to certain employees who have permanent physical impairments or who have returned to work at the same or greater wage than at the time of their injury. Specifically, this statute provides the following:

1. 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; or
2. If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this

subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments.

When evidence supports the application of both KRS 342.730(1)(c)1 and (c)2 to enhance benefits, an ALJ must decide which provision is more appropriate based on the facts of the case. *Fawbush v. Gwinn*, 103 S.W.3d 5, 12 (Ky. 2003). The application of paragraph (c)1 is more appropriate if the evidence establishes that a worker is unlikely to be able to continue earning a wage that equals or exceeds his wage at the time of injury for an indefinite period. *Id.* Thus, the ALJ's central legal issue is determining whether a worker can continue to earn a wage that equals or exceeds his pre-injury wage for an indefinite period of time. *Adkins v. Pike County Bd. of Educ.*, 141 S.W.3d 387, 390 (Ky.App. 2004).

The Board found that Hunter's circumstances were within the parameters of both KRS 342.730(1)(c)1 and (c)2, and this finding is uncontested.

Further, the Board wrote, in pertinent part, the following:

... the ALJ was well within his role as fact finder in determining that KRS 342.730(1)(c)(1) should be applied to this claim rather than KRS 342.730(1)(c)(2). While Hunter had returned to work at a wage equal to or greater than the wage earned at the time of his injury, the ALJ was not persuaded Hunter had the ability to earn this wage for the indefinite future. Dr. Aaronson stated Hunter's work life would be shortened without surgery. His statement was not limited to the particular job Hunter

was performing, but rather addressed to all future employment.... Here, we believe the ALJ properly considered Dr. Aaronson's uncontradicted statement Hunter's work life would be shortened without surgery in determining the three multiplier was more appropriate.

After reviewing the record, we conclude that the Board's findings were not supported by substantial evidence and, thus, must be reversed.

Although Dr. Aaronson's opinion that Hunter's normal work life would be shortened without surgery was uncontradicted, the record is devoid of any evidence indicating the degree of this shortening. While this medical opinion is entitled to the great weight it was assigned, our acceptance of this opinion does nothing to illuminate with any specificity the prospective continuation of Hunter's physical capacity to maintain adequate employment under paragraph (c)1. From the Board's findings, we are simply left to speculate as to when Hunter would be unable to maintain employment at a wage equaling or exceeding his wage at the time of injury. Such evidence does not support the application of KRS 342.730(1)(c)1.

We further note the Board's placement of great significance in *Adkins v. Pike County Bd. of Educ.*, as a basis for upholding the ALJ's findings is misplaced. To the contrary, we believe that our conclusion in this case is consistent with the holding in *Adkins*. In *Adkins*, this Court concluded that the ALJ failed to determine the claimant's "ability to earn a wage that equals or exceeds his wage at the time of the injury for the indefinite future." *Id.* at 390. Here, the Board found that Hunter's work life would be shortened at some indefinite point in

the future. Thus, Hunter's work life may continue for one month, one year, or a decade into the future. Such findings do not rise to the degree of definitiveness required by KRS 342.730(1)(c)1.

For the foregoing reasons, the opinion of the Board is reversed and this case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joseph Kelley
Madisonville, Kentucky

BRIEF FOR APPELLEE:

Thomas M. Rhoads
Madisonville, Kentucky