RENDERED: October 25, 1996; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-0382-WC

ALCAN FOIL PRODUCTS — APPELLANT

v.

PETITION FOR REVIEW
OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
WC-93-25085

CHRIS K. PAPE; WILLIAM O. WINDCHY,
ACTING DIRECTOR OF THE SPECIAL FUND;
HON. ZARING P. ROBERTSON, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
AFFIRMING

* * *

BEFORE: GARDNER, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is a petition for review of a decision of the Workers' Compensation Board, reversing an opinion by the Administrative Law Judge, determining that the employer was entitled to take credit against a workers' compensation award for payments made under a disability pension plan. After reviewing the facts and the applicable law, including recent decisions on

the issue, we affirm the Board's decision denying the employer credit.

Chris Pape filed a workers' compensation claim against Alcan Foil Products ("Alcan") and the Special Fund, alleging occupational disability from a knee injury at work. The Administrative Law Judge ("ALJ") found that Pape sustained a 30% permanent partial occupational disability and apportioned liability three-fourths to Alcan and one-fourth to the Special Fund. The ALJ also determined that Alcan was entitled to credit for disability pension payments against Pape's award until Pape's 65th birthday, when Pape's pension converts to normal retirement benefits. The disability pension plan at issue contained no internal offset provision, was unilaterally funded by Alcan without monetary contribution from the employee, and required a minimum of 10 years' service with Alcan before it vested. In this case, it had vested as Pape had been employed by Alcan for almost 22 years. Under the plan, once an employee is entitled to receive a certain amount of benefits, the amount is not subject to an increase or reduction except that should Pape become medically able to return to work, he could lose his disability pension benefits.

The ALJ ruled that under Beth-Elkhorn Corporation v. Lucas, Ky. App., 670 S.W.2d 480 (1983), he had no choice but to allow Alcan credit against the award. The Workers' Compensation Board ("Board") reversed the ALJ's decision and denied Alcan credit based on the recent holdings in American Standard v. Boyd, Ky., 873 S.W.2d 822 (1994) and GAF Corp. v. Barnes, Ky., 906

S.W.2d 353 (1995), which did not become final until after the ALJ's opinion was rendered.

The employer has the burden of proving entitlement to credit against a workers' compensation award. Ephraim McDowell Regional Medical Center v. Grigsby, Ky. App., 862 S.W.2d 331 (1993). To meet this burden, the employer must prove several relevant factors, including, but not limited to, unilateral funding of the plan by the employer, the duration and conditions of coverage under the plan and whether the plan contains its own internal offset provisions. American Standard v. Boyd, supra; Eastern Coal Corporation v. Mullins, Ky. App., 845 S.W.2d 27 (1993). The purpose of the credit is to avoid duplicate recovery. Gatliff Coal Company v. Evans, Ky., 896 S.W.2d 608 (1995), quoting American Standard v. Boyd, supra at 823.

Since the disability pension plan in the present case was unilaterally funded and did not contain its own internal offset provisions, it would seem that Alcan should be entitled to credit under the dictates of American Standard, supra and Beth-Elkhorn Corp. v. Lucas, supra. ("Even if the disability plan in question does not expressly provide, benefits will be integrated when possible." American Standard, supra at 824, citing Beth-Elkhorn, supra.) However, it has been recently held that if the disability plan is a product of the collective bargaining process, it may properly be presumed to be a bargained-for benefit which would be in addition to workers' compensation

benefits and, thus, not duplicative of workers' compensation benefits. GAF Corp. v. Barnes, Ky., 906 S.W.2d 353 (1995).

In the case at bar, the evidence as to whether or not the disability pension plan at issue was the result of collective bargaining was conflicting. The ALJ was persuaded by the evidence presented by Pape that the disability pension plan was a benefit negotiated by the employee bargaining unit.

The ALJ, as fact-finder, has the sole authority to judge the weight, credibility, substance and inference to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985); Kentucky Carbon Corporation v. Dotson, Ky. App., 573 S.W.2d 368 (1978). Since the employer had the burden of proof in this case, the question on appeal to the Board was whether the evidence before the ALJ was so overwhelming, upon consideration of the record as a whole, as to compel a finding in the employer's favor. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984); Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979); Howard D. Sturgill & Sons v. Fairchild, Ky. App., 647 S.W.2d 796 (1983). The Court of Appeals' function in reviewing the opinions of the Workers' Compensation Board is "[t]o 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, Ky., 827 S.W.2d 685, 687-88 (1992).

In reviewing the record, we cannot say that the evidence before the ALJ compelled a different finding as to the disability plan's being a product of collective bargaining. Based on that finding, the Board properly reversed the ALJ on the conclusion of law to be drawn therefrom in its application of the aforementioned recent case law.

For the reasons stated above, the opinion of the Workers' Compensation Board is affirmed.

GARDNER, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY BY SEPARATE OPINION.

JOHNSON, JUDGE, CONCURRING IN RESULT. I concur with the result reached by the Majority Opinion but choose to write separately. I do not believe this case turns on whether or not Pape was subject to a collective bargaining agreement. Instead, I believe the failure of the employer to include an offset provision in the disability plan is the determining factor. See American Standard v. Boyd, Ky., 873 S.W.2d 822, 823 (1994). I am of the opinion that the language in GAF Corporation v. Barnes, Ky., 906 S.W.2d 353 (1995), concerning a collective bargaining agreement is merely the recognition of an obvious fact; i.e., employers and employees negotiate contracts with the purpose of compensating workers for their labor which is desired by the employer. I do not read Barnes as holding the converse to be true--that a benefit which is not union-negotiated is the result

of employer largess. To so rule would be a total denial of economic reality.

The employer expresses great consternation over the Board's ruling which does not allow it to offset the payments under the disability plan against workers' compensation benefits. I suggest that the recent cases of Conkwright v. Rockwell International, Ky. App., 920 S.W.2d 90 (1996); and Wayne Supply Company v. Dugger, Ky. App., 918 S.W.2d 234 (1996), may be of some help in understanding this question. However, I continue to hold the belief set forth in my separate concurring opinion in Conkwright, supra at 92. The Supreme Court should take further action to clarify this area of the law.

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