RENDERED: DECEMBER 22, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 2000-CA-000208-WC

WALKER MECHANICAL — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-92236

STEVEN G. BRAY; KEVIN T. PAVELONIS, D.C.;
HON. DONNA H. TERRY, ADMINISTRATIVE LAW
JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

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

BEFORE: DYCHE, KNOPF AND McANULTY, JUDGES.

McANULTY, JUDGE: In this petition for review of a decision of the Workers' Compensation Board ("Board") Walker Mechanical asserts that the Board erred in affirming the opinion and award of the Administrative Law Judge ("ALJ"). Specifically, Appellant asserts that the ALJ's finding of a five (5) percent impairment rating is not supported by the evidence. In addition, Appellant contends that the ALJ erred in concluding that the benefit amount should be enhanced by the 1.5 multiplier in KRS 342.730(1)(c)(1). Instead, it contends that the ALJ should have applied the .5 modifier in KRS 342.730 (1)(c)(2).

Steven Bray worked as an apprentice plumber for Walker Mechanical. On February 24, 1998, he injured his back when a wall of dirt collapsed in the trench in which he was working and buried him to his waist. He first visited Dr. Podoll and then changed to Dr. Ballard at his supervisor's suggestion. Bray eventually resigned his position with Walker Mechanical and found other work which he stated is less physically demanding.

The ALJ relied on the independent medical examination report from Dr. Hurt in which he assessed a 5% impairment rating. The ALJ then concluded that Bray was entitled to a 1.5 enhancement of the permanent partial disability award under KRS 342.730(1)(c)(1) due to his lack of physical capacity to return to the type of work performed at the time of injury. Walker Mechanical filed a petition for reconsideration of these determinations and also raised the issue that the ALJ should have invoked the .5 modifier because Bray earned a greater weekly wage with his new employer. The ALJ declined to reconsider. Walker Mechanical appealed these issues and the Board affirmed.

On appeal to this Court, Walker Mechanical presents two issues for review. First, it asserts that the ALJ's finding of a 5% impairment rating is not supported by substantial evidence. Second, it contends that the ALJ erred in applying the 1.5 multiplier and that the evidence mandates a .5 modifier instead.

The Board correctly recognized that the question before them was whether the ALJ's decision was supported by substantial evidence. Wolf Creek Colleries v. Crum, Ky. App., 673 S.W.2d 735 (1984). The Supreme Court defines substantial evidence as

evidence of relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). As long as any evidence of substance supports the ALJ's findings, the Board must affirm. Id.

Walker Mechanical argues that the ALJ's finding of 5% impairment is not supported by any evidence whatsoever. This argument is simply incorrect. In the report from the independent medical examination, Dr. Hurt clearly states:

> Mr. Bray does have an impairment. I would rate his impairment at 5 percent to the whole person. This is using the AMA Guidelines Fourth Edition, Table 72 Page 110.

While Dr. Hurt's report continues, finding that 40% of the impairment is attributable to a pre-existing condition, the ALJ is under no duty to accept all the conclusions of Dr. Hurt merely because she accepts one of them. Rather, as fact-finder she may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977). The ALJ outlined her reasons for the finding that Bray's condition was a separate injury and not an exacerbation of the previous injury. The Board did not err in affirming on this issue.

In regards to the issue of whether the ALJ erred in applying the 1.5 multiplier we again turn to the evidence. The ALJ acknowledged the parties stipulation that Bray's average weekly wage had been $402.98. She then relied on testimony that Bray had asked Dr. Ballard to release him to return to full duty

because there was no light duty work available. The ALJ also noted that Bray felt his position with Walker Mechanical was too physically demanding, therefore he sought lighter work. Finally, the ALJ indicated that Bray's physical ability was best detailed in the restriction noted by Dr. Hurt. Accordingly, the ALJ determined that the award should be multiplied by 1.5 as required in KRS 342.730(1)(c)(1). Although there was conflicting evidence on this matter, the ALJ is free to choose what evidence to believe. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977). We therefore affirm on this issue.

We now turn to the remaining question, whether the Board correctly determined that Walker Mechanical is not entitled to the .5 reduction for weeks in which Bray's wage exceeds his average weekly wage at Walker Mechanical. We first note that Bray testified that his new employer compensates him at the rate of $9.09 per hour, less than his hourly wage at Walker Mechanic. However, the records of his weekly earnings with the new employer reveal that in some weeks when he works overtime, he receives compensation in excess of the average weekly wage at Walker Mechanical.

The pertinent part of KRS 342.730(1)(c)(2) provides as follows:

> 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 otherwise payable under paragraph (b) of this subsection shall be reduced by one-half (1/2) 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 restored to the rate prescribed in paragraph (b) of this subsection.

The Board concluded that in deciding not to invoke the .5 modifier, the ALJ properly relied on Bray's testimony that he earned less per hour at his new job and did not frequently work overtime. The Board continued its analysis of KRS 342.730(1)(c)(2), rationalizing that the legislature did not intend to require a weekly accounting and determination of whether the wage each week exceeds the pre-injury average weekly wage.

We can find no error in the Board's decision that the ALJ did not err on this issue. The ALJ accepted Bray's testimony that he was earning less at his new job. Although Walker Mechanical presented conflicting evidence, the ALJ is entitled to choose which evidence to believe. Pruitt v. Bugg Brothers, supra. Because we believe that the Board correctly determined that the ALJ's decision not to invoke the modifier was supported by substantial evidence, the inquiry ends here. The ALJ did not err in failing to apply the modifier, therefore we do not delve into the specifics of how the modifier is to be applied.

For the foregoing reasons, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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