

RENDERED: June 25, 2004; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-001912-WC

CONKRIGHT CUSTOM SIDING

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-93-29455

RANDALL ROCK; ROBERT L.  
WHITAKER, DIRECTOR OF WORKERS'  
COMPENSATION FUNDS; R. SCOTT  
BORDERS, ADMINISTRATIVE LAW  
JUDGE; AND WORKERS' COMPENSATION  
BOARD

APPELLEES

### OPINION

### AFFIRMING

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BEFORE: GUIDUGLI, MINTON AND VANMETER, JUDGES.

VANMETER, JUDGE. Conkright Custom Siding has petitioned for review of an opinion of the Worker's Compensation Board ("Board") entered on August 13, 2003, which affirmed the Administrative Law Judge's ("ALJ") decision granting Randall Rock's motion to reopen his work-related injury claim and awarding him benefits based upon a finding of a permanent, total

disability. Having concluded that the Board did not err by affirming the ALJ's granting of Rock's motion to reopen and awarding him benefits based on an increase in occupational disability, we affirm.

On July 12, 1993, Rock sustained a work-related injury while lifting an extension ladder in the course of his employment with Conkright. Rock's attending physician, Dr. Patrick O'Neill, subsequently took him off work. Upon undergoing an MRI, which revealed a ruptured disc, Dr. O'Neill referred Rock to Dr. David Eggers, a neurosurgeon. On September 8, 1993, Dr. Eggers performed lumbar surgery to relieve Rock's right leg radiculopathy. Following the surgery, Rock underwent physical therapy until the pain in his left leg persisted and revealed that Rock had developed left leg radiculopathy. Rock began seeing Dr. Randall Oliver, a pain specialist, for further medical treatment.

Subsequently, Rock entered into a settlement agreement for compensation with Conkright based on a forty percent (40%) permanent partial disability, which was approved by an order from the ALJ on May 26, 1994, and with the Special Fund, approved on September 15, 1994. In addition, the settlement agreement provided that Rock received \$2,000.00 in vocational rehabilitation benefits. Rock has not returned to any employment since his July 1993 work-related injury.

On December 11, 2000, Rock filed a motion to reopen his injury claim under KRS 342.125. In support of Rock's motion to reopen, he submitted medical proof consisting of a deposition transcript of Dr. Oliver, a medical report from Dr. O'Neill and the medical records of Dr. Eggers. Rock also attached an affidavit to the motion alleging that he had suffered a significant increase of occupational disability due to his worsening lumbar condition. The medical report from Dr. O'Neill concluded that Rock suffered from acute and chronic low back pain due to a diffused disk bulge left at the L4-5 level, which produced effacement of the ventral thecal sack. Dr. O'Neill further concluded that Rock was permanently and totally disabled. The basis for Rock's motion to reopen was that his condition continued to deteriorate, which resulted in greater restrictions, more pain and irritation, and the need for continued medical care. On January 24, 2001, the ALJ granted Rock's motion to reopen based on KRS 342.125. The merits of Rock's assertion that he was entitled to additional benefits was decided in his favor on March 21, 2003, according to the standard in *Osborne v. Johnson*, Ky., 432 S.W.2d 800 (1968). The ALJ awarded Rock \$186.68 per week as permanent, total disability benefits for so long as he is disabled.

In an opinion entered on August 13, 2003, in finding that there was substantial evidence in the record to support the

ALJ's conclusion, the Board affirmed the ALJ's permanent disability benefits. Conkright's petition for review to this court followed.

First, Conkright argues that Rock failed to meet his burden of proof to succeed on a motion to reopen under KRS 342.125 and that no substantial evidence supports the finding that Rock experienced an increase in occupational disability.

Under KRS 342.125, a motion to reopen is the procedural device for invoking jurisdiction of the Department of Workers' Claims to reopen a final award. To prevail, the movant must offer prima facie evidence of one of the grounds for reopening under KRS 342.125(1). *Stambaugh v. Cedar Creek Mining Co., Ky.*, 488 S.W.2d 681 (1972). Upon granting the motion to reopen, the movant then proceeds to litigate the merits of an assertion that he or she is entitled to additional income benefits under KRS 342.730. *Id.*

In *Woodland Hills Mining, Inc. v. McCoy, Ky.*, 105 S.W.3d 446, 448 (2003), the Court held that where a claim had arisen and had been settled prior to the 1996 amendments to KRS 342.125,<sup>1</sup> the date of the injury controlled which version of KRS 342.125 would govern the evidentiary standard on a motion to

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<sup>1</sup> Effective December 12, 1996, KRS 342.125(1) was amended to change the relevant ground for reopening from "a change in occupational disability" to "a change of disability as shown by objective medical evidence of worsening or improvement of impairment . . . ."

reopen. See also *Dingo Coal Co., Inc. v. Tolliver*, Ky., 129 S.W.3d 367, 370-71 (2004).<sup>2</sup> In the present case, the requirement for reopening that existed on the date of Rock's injury controlled the rights and obligations of the parties, even though Rock's motion to reopen was filed after the enactment of the 1996 amendment. *Woodland Hills Mining, Inc.*, 105 S.W.3d at 448.

Thus, the burden was on Rock to prove that his occupational disability increased between the date of the award and the date of his motion to reopen. Rock succeeded in persuading the ALJ that he experienced an increase in occupational disability and that he was totally disabled.<sup>3</sup> On appeal to the Board, Rock had the burden to prove that the ALJ's conclusion was supported by substantial evidence. *Special Fund v. Francis*, Ky., 708 S.W.2d 641, 643 (1986); *Wolf Creek Collieries v. Crum*, Ky. App., 673 S.W.2d 735, 736 (1984).

Substantial evidence is defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Smyzer v. B.F.*

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<sup>2</sup> In *Dingo Coal Co.*, 129 S.W.3d at 370, the court held that reliance on *Peabody Coal Co. v. Gossett*, Ky., 819 S.W.2d 33 (1991), "is misplaced where an appeal concerns the decision on the merits of a reopening for additional benefits under KRS 342.730."

<sup>3</sup> In *McNutt Construction/First General Services v. Scott*, Ky., 40 S.W.3d 854, 859-60 (2001) the court concluded: "[D]etermining whether a particular worker has sustained a partial or total occupational disability as defined by KRS 342.011(11) clearly requires a weighing of the evidence concerning whether the worker will be able to earn an income by providing services on a regular and sustained basis in a competitive economy."

*Goodrich Chemical Co., Ky.*, 474 S.W.2d 367, 369 (1971). As a fact-finder, the ALJ has the authority to determine the quality, character, and substance of all the evidence. *Square D Co. v. Tipton, Ky.*, 862 S.W.2d 308, 309 (1993); *Paramount Foods, Inc. v. Burkhardt, Ky.*, 695 S.W.2d 418, 419 (1985). The ALJ is the sole judge of the weight of and inferences to be drawn from the evidence. *Miller v. East Ky. Beverage/Pepsico, Inc., Ky.*, 951 S.W.2d 329, 331 (1997). Also, the ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same adversary party's total proof. *Magic Coal Co. v. Fox, Ky.*, 19 S.W.3d 88, 96 (2000). The mere fact that there was evidence contrary to the ALJ's conclusion upon reopening is insufficient to support a reversal on appeal. *Whittaker v. Rowland, Ky.*, 998 S.W.2d 479, 482 (1999).

On petition for our review, "the Court of Appeals 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, Ky.*, 827 S.W.2d 685, 687-88 (1992). Based on the foregoing, we conclude that the Board did not err, as there was substantial evidence to support the ALJ's finding that Rock had an increase in occupational disability.

The merits of Rock's motion to reopen were decided in his favor and, relying on the standard in *Osborne v. Johnson*, Ky. App., 432 S.W.2d 800 (1968),<sup>4</sup> the ALJ concluded:

[T]he medical records chronicle the increased symptoms and worsening of Mr. Rock's condition over the years including the increased restrictions that would limit him to less than sedentary type of work.

After careful consideration of Mr. Rock's age, limited education, academic skills, and prior work history consisting solely of manual labor positions, and the medical evidence of record, the Administrative Law Judge finds that Mr. Rock is permanently and totally disabled.<sup>5</sup>

Finding that the ALJ's decision was based on substantial evidence, the Board held on appeal as follows:

Conkright points to the evidence that Rock never returned to work and was never symptom-free following his settlement. It emphasizes the medical evidence in the record that Rock was unqualified to perform his past jobs in 1994, and his physical and occupational impairment has not worsened since that time.<sup>6</sup> It relies in part on the

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<sup>4</sup> In *Dingo Coal Co.*, 129 S.W.3d at 371, the court ultimately held: "[t]he claimant's injury and award both occurred before December 12, 1996. His subsequent motion to reopen was granted, and the merits of his assertion that he was entitled to additional benefits were decided in his favor under the *Osborne v. Johnson* standard. As we have explained, that was the appropriate standard for considering the merits of a motion to reopen a pre-December 12, 1996, award." (Citation omitted.) Here, Rock's award was entered in 1994.

<sup>5</sup> The ALJ specifically considered the fact that Rock failed to graduate from high school, failed to earn a GED, had a work history of only manual labor and his restrictions increased, which precluded him from jobs involving manual labor.

<sup>6</sup> Conkright makes a similar argument for our review; however, we find no error in the Board's analysis.

fact Rock never participated in vocational rehabilitation.

While the evidence in the record might very well have supported the finding Conkright seeks, there remains substantial evidence to support a finding of an increase in occupational disability. *Special Fund v. Francis*, Ky., 708 S.W.2d 641 (1986). Here, Rock testified that he is now capable of less activity than at the time of the original settlement. While he may not have returned to work following the injury, that fact does not preclude a finding of total disability on reopening. Rock's testimony concerning his physical capabilities and ability to labor is relative and probative regarding the extent of occupational disability. See *McNutt Construction Co. v. Scott*, Ky., 40 S.W.3d 854 (2001); *Hush v. Abrams*, Ky., 584 S.W.2d 48 (1979).

Contrary to Conkright's arguments, there is medical evidence that Rock is now more restricted than at the time of the original settlement. As noted by the ALJ, Dr. Eggers increased Rock's restrictions and Dr. O'Neill believed Rock to be totally occupationally disabled in 1995.<sup>7</sup> The fact that Rock did not undergo vocational rehabilitation has no bearing on the issue on appeal since a claimant need not be totally occupationally disabled to be awarded rehabilitation benefits. *Haddock v. Hopkinsville Coating Corp.*, Ky., 62 S.W.3d 387 (2001).

*See also McNutt Construction*, 40 S.W.3d at 860.

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<sup>7</sup> Specifically, after Rock's surgery and prior to the settlement in 1994, Dr. Eggers restricted Rock to a twenty-five (25) pound limit and no stooping, no bending, no squatting, no climbing, as well as recognizing his ability to sit for an hour and a half and walk for about one mile. In 1995, Dr. Eggers increased Rock's restrictions to a ten (10) pound weight limit and only thirty (30) minutes of walking, standing and sitting. In April 1995, Dr. O'Neill stated in his medical report that Rock had suffered irreversible damage to his back and that he will never be gainfully employed again.

Even so, Conkright argues that Dr. O'Neill's medical report was "only a different expression" of opinion concerning Rock's disability, which should not have been considered as a controlling factor in finding that Rock had an increase in occupational disability. However, "[i]t is among the functions of the ALJ to translate the lay and medical evidence into a finding of occupational disability," *McNutt Construction*, 40 S.W.3d at 860, and, as the ultimate fact-finder, the ALJ has the sole discretion to determine the quality, character and substance of the evidence presented. *Whittaker*, 998 S.W.2d at 481-81; *Square D Co.*, 862 S.W.2d at 309; *Paramount Foods, Inc.*, 695 S.W.2d at 419. As such, we are not persuaded that the ALJ overlooked or misunderstood any relevant evidence with respect to Rock's permanent disability or that the Board's review of the evidence was erroneous.<sup>8</sup>

Finally, Conkright argues that the Board erred since the evidence compelled a finding of a pre-existing active disability based on a 1987 work-related injury, which Rock

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<sup>8</sup> Conkright cites *Gro-Green Chemical Co. v. Allen*, Ky. App., 746 S.W.2d 69 (1987), for the proposition that a change of physical condition, by itself, is insufficient to support a finding of increased occupational disability. Unlike the present case, the evidence in *Gro-Green* consisted only of an increase in functional impairment. Additionally, both *Gro-Green* and *Central City v. Anderson*, Ky. App., 521 S.W.2d 246 (1975), were decided prior to the 1987 amendment to KRS 342.125, which permitted reopening upon evidence of increased occupational disability due to a "change of condition" that was interpreted by the courts as a change of physical condition. See *Continental Air Filter Co. v. Blair*, Ky., 681 S.W.2d 427, 428 (1984). In 1987, KRS 342.125(1) was amended and the phrase "change of condition" was replaced with "change of occupational disability."

settled for in the amount of 16.9%. Conkright cites *Wells v. Bunch*, Ky., 692 S.W.2d 806, 808 (1985), quoting *Griffin v. Booth Memorial Hospital*, Ky., 467 S.W.2d 789, 790 (1971), for the following rule:

"The test is not whether the employe [sic] is working, but how much, if any, occupational disability, by the standards employed in determining allowance for workmen's compensation benefits, the employe's [sic] condition evidenced immediately before he received the second injury."

Conkright contends that since Rock had a pre-existing active disability, Rock's weekly benefits for experiencing total occupational disability are erroneous. However, the ALJ rejected this argument and concluded:

The parties are the ones obligated to raise said issues not the Administrative Law Judge. A Benefit Review Conference was held on January 22, 2003 and an Order and Memorandum was signed and agreed to by all parties indicating that the sole contested issue was whether or not Plaintiff had an increase in occupational disability. Further the Administrative Law Judge was in fact well . . . [aware] of the pre-existing settlement and finds that the Defendant/Employer failed to meet their burden of proving that the Plaintiff suffered from any pre-existing active occupational disability.

On appeal, the Board held:

While there was evidence in the record to indicate that Rock may have sustained an occupationally disabling injury in 1987,

there was also testimony from Rock that he was able to perform all his job functions prior to the 1993 injury with Conkright. This testimony, standing alone, is sufficient to support the award without any carve out for a preexisting condition.<sup>9</sup>

Accordingly, we find that the Board's review of the evidence was not erroneous, as the ALJ's decision was based on substantial evidence.

Based on the foregoing, the opinion of the Worker's Compensation Board is affirmed.

ALL CONCUR.

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<sup>9</sup> "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." *McNutt Construction*, 40 S.W.3d at 860. See also *Hush v. Abrams*, Ky., 584 S.W.2d 48 (1979).