RENDERED: February 18, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001356-WC

BARNES SERVICES, INC. — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-02-71958

MICHAEL MILROY; HON. RICHARD M. JOINER, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; JOHNSON AND MINTON, JUDGES.

JOHNSON, JUDGE: Barnes Services Inc. has petitioned this Court for review of an opinion of the Workers' Compensation Board entered on June 9, 2004, in favor of the claimant/appellee, Michael Milroy. While the Board affirmed in part and vacated and remanded in part, an opinion of the Administrative Law Judge on various issues, this petition for review is limited to the Board's affirming of the ALJ's finding of no pre-existing active impairment and the Board's vacating and remanding of the ALJ's

finding that Milroy could perform the work he performed at the time of the injury. Having concluded that the Board has not overlooked or misconstrued controlling statutes or precedent or committed an error in assessing the evidence so flagrant as to cause gross injustice[1], we affirm.

Milroy, who was born on February 16, 1960, has a history of back pain and injuries. Milroy has a tenth-grade education, and no specialized or vocational training.[2] After leaving high school, Milroy worked from 1979 to 1991 on his father's dairy farm in Wisconsin. In 1991 Milroy moved to Kentucky and was self-employed as a fence builder and was also employed by Calhoun Creek Gate Company, where he was responsible for painting, loading, and delivering farm gates. In 1994 Milroy began working for Barnes in maintenance and grounds keeping and performed a variety of tasks including, but not limited to, mowing, weed-eating, picking up trash, operating waxing machines and scrubbers, repairing broken equipment, and salting and removing snow and ice. Milroy testified that his job with Barnes required him to lift as much as 80 to 200 pounds. In 1998 Milroy was terminated by Barnes for theft and

[1] Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992).

[2] Milroy testified in his deposition that he had taken one vocational class.

served 30 days in jail.[3] Subsequently, he worked for Keith Gate Company until 1999, when he returned to Barnes with the same job responsibilities as he previously had. Milroy has not returned to Barnes since he was injured on May 16, 2002, nor has he had other employment since that date.

Milroy has a history of injuries. His first injury occurred in 1979 when he slipped and fell on ice, while working on his family's dairy farm. He received six to eight weeks of chiropractic care and then returned to work. Milroy's second injury occurred while working for Calhoun Creek in 1992. Milroy hurt his low back when he fell 13 feet from the top of a truck loaded with gates, landing directly on his feet. He did not work for six to seven months after the injury and during this time he was seen by various physicians. The third injury occurred in 1998 while Milroy worked for Keith Gate Company. He slipped and fell while painting a gate and complained of low back pain, left leg pain and numbness to his mid-thigh. He was treated by Dr. Ted Murphy, a chiropractor, and returned to work after two weeks of treatment, with no further problems.

The fourth injury occurred in February 2000 after Milroy returned to work for Barnes. He was salting steps, slipped on ice, and twisted his back. He was treated at a local

[3] Milroy testified in his deposition that he left Barnes in 1998 for a "change". However, he later admitted that he was terminated because of theft.

hospital for a lumbosacral strain, and returned to work three days later. He then injured his knee in July 2000 while working for Barnes, had surgery, and did not return to work until September 2000. Milroy testified that he had no back pain as a result of this injury, other than from his limp due to his resulting abnormal gait. On March 8, 2002, Milroy injured his low back when he lifted a cigarette urn, while working for Barnes, that weighed approximately 150 pounds.[4] He received chiropractic care from Dr. Murphy for one week and missed three days of work.[5] Milroy testified he was having no problem with his back, at the time he returned to work. Then on April 28, 2002, Milroy was injured at home when he slipped and fell in mud, while moving a railroad tie. Milroy experienced pain in the center of his back, radiating to his right buttock, but felt no pain in his hip or thighs. Dr. Murphy treated Milroy for lumbosacral strain together with subluxation of the right hip, mild sciatica, with radiation of pain into the right leg, together with mild spasms of the lower back. Milroy received chiropractic care for two weeks and did not work during this

[4] Heather Ramey, Barnes's Human Resource Manager, testified that moving the cigarette urns was not a normal duty of Milroy's employment. However, Milroy provided undisputed testimony concerning other duties at Barnes requiring him to lift 80 to 200 pounds.

[5] Milroy did not submit the medical bills for this injury to Barnes's workers' compensation carrier.

time. He was released back to work on May 13, 2002, and was on light duty until May 16, 2002, when he returned to regular duty.

On that date, Milroy was descending a flight of rain-soaked stairs with a bag of trash when he slipped on the fourth step from the bottom and caught himself by grabbing the hand rail before he hit the ground, at which time he felt his back pop, had low back pain and then pain and numbness in his right leg when he took a step. He finished his rounds, left a note on his time card that he had hurt his back and was going to the doctor, and left work early. Milroy attempted to see Dr. Murphy on that date, but he was out of town. He first saw Dr. Murphy on May 20, 2002, complaining of low back, right leg, and hip pain and was subsequently treated by Dr. Murphy with adjustments every two or three days, therapy, and a TENS unit for approximately five months. Dr. Murphy referred Milroy to a nurse practitioner, who took X-rays, ordered an MRI and prescribed pain medication. Milroy also saw a neurosurgeon, who ordered an MRI and recommended that Milroy receive additional testing; however, because he had no health insurance or the necessary funds, he did not follow through with these recommendations.

Milroy filed for benefits with Barnes's workers' compensation carrier, but the claim was denied on March 20, 2003. Milroy then filed an application for resolution of his

injury claim on April 16, 2003, and a hearing was held before ALJ Richard M. Joiner on October 22, 2003, at which time Milroy and Heather Ramey, Barnes's Human Resource Manager, testified. There was also medical evidence offered by both Milroy and Barnes. Milroy offered into evidence the notes of Dr. Murphy from March 2002, through October 11, 2002, and two letters from Dr. Murphy dated October 11, 2002, and December 20, 2002. He also introduced the report of Dr. James Templin who evaluated Milroy on April 1, 2003, at the request of his attorney. Barnes offered into evidence the report of Dr. William Lester, its independent medical examiner, who evaluated Milroy on July 14, 2003.

According to Dr. Murphy's notes, he began treating Milroy for low back pain in 1998 after he was injured while working at Keith Gate Company. He treated Milroy three times for this injury and did not see Milroy again until March 11, 2002, after Milroy was injured lifting a cigarette urn while working for Barnes. Dr. Murphy's December 20, 2002, letter indicates that Milroy suffered from a lumbar strain, but was fully recovered from this injury and released from his care on March 23, 2002. Dr. Murphy then saw Milroy on April 28, 2002, after he injured his low back while working at home, treated him five times, and released him on May 10, 2002. Dr. Murphy states in his letter dated December 20, 2003, that Milroy had recovered

from the accident at that time. Dr. Murphy further indicates in his December 20, 2002, letter that Milroy's May 16, 2002, accident was much more severe than the injuries he received on March 8, 2002, and April 28, 2002, and specifically explains as follows:

> In the accident before there was only a mild case of sciatica, in the latter accident when Mr. Milroy fell it caused the sciatic nerve to become compressed, causing permanent [bulging] of the disc. The problems that Mr. Milroy is having from this last accident are more severe. The other injuries were only moderate in nature as compared to this time. The other conditions were conditions that he recovered from. However, the [bulging] disc will not resolve itself.

On April 1, 2003, Dr. James Templin performed an examination on Milroy, upon request of his attorney. Dr. Templin took Milroy's medical history, including previous medical problems and current medications, and he reviewed Dr. Murphy's records from March 2002 through October 11, 2002. Dr. Templin's report indicates that he understood Milroy had a history of low back injuries. Dr. Templin learned from Milroy that on May 16, 2002, he had missed a step causing him to lose his balance and fall down the remaining steps, but caught himself on the hand rail before falling down, immediately experiencing pain in the mid- back area. Dr. Templin reviewed diagnostic studies, including October 5, 2002, x-rays and an MRI

dated October 17, 2002. He also performed a physical exam of Milroy.

Based on this information, Dr. Templin concluded that Milroy had chronic low back pain syndrome, right leg radiculopathy, degenerative lumbar disc disease, degenerative thoracic disc disease, and disc bulge/protrusion at L5-S1. Dr. Templin found that it was within reasonable medical probability that Milroy's injury on May 16, 2002, was the cause of his complaint and that based on the most recent AMA Guides to Evaluation of Permanent Impairment, Milroy's permanent whole body impairment was 13% due to a DRE lumbar Category III impairment to the whole person with right leg radiculopathy. Dr. Templin further found that Milroy had no active impairment prior to the May 16, 2002, injury, and thus, did not apportion the impairment. Dr. Templin stated that Milroy was unable to return to the same type of work performed at the time of the injury.[6] Dr. Templin found Milroy was unable to return to any activity such as prolonged walking, standing, sitting, frequent bending, stooping, kneeling, crouching, lifting, carrying, climbing, or riding in or on vibratory vehicles for any extended distance or time. He further found that Milroy was unable to lift items weighing greater than 20 pounds from waist level or

[6] Dr. Templin found that these work activities required bending, lifting, pushing, pulling, tugging, twisting, climbing, prolonged standing, and walking.

to carry this weight for any extended distance or time and was unable to perform any lifting from floor level. He was further found unable to engage in activities requiring repetitive use of foot controls with the right foot.

Upon Barnes's request, Dr. William J. Lester performed a medical evaluation of Milroy on July 14, 2003. According to Dr. Lester's report, Milroy stated that on May 16, 2002, he fell down stairs and then developed pain in the right side of his back and down his right leg. Milroy described his pain as a nine out of ten, with his right leg giving way and having constant pain in his back. Milroy also described having symptoms of numbness and tingling in his right leg and an inability to sit or stand for longer than 20 minutes or walk 50 feet without having difficulty. While Dr. Lester's report indicates that Milroy had never had a problem like this before, the report also indicates that Dr. Lester was aware of the April 28, 2002, accident and that Milroy had complained of numbness to Dr. Murphy at that time. It is apparent from Dr. Lester's report that he had read Dr. Murphy's letter dated December 20, 2002, and was aware that Milroy had a history of low back problems. Dr. Lester's report does not indicate that he reviewed Milroy's October 5, 2002, x-rays or his October 17, 2002, MRI. Based upon his physical examination and review of Dr. Murphy's notes and letters, Dr. Lester assessed Milroy as

having a 5% functional impairment rating and concluded that 50% of this rating was due to a pre-existing active condition which had not resolved at the time of the injury. Dr. Lester found that Milroy did not need further chiropractic treatment and should reduce his intake of pain medication. He recommended that Milroy not lift over 50 pounds, but suggested that due to the inconsistencies in Milroy's physical examination[7] a functional capacity evaluation be performed to determine any permanent restrictions.[8]

After considering the testimony of Milroy and Ramey, and the medical evidence submitted by both parties, the ALJ entered an opinion and award on December 12, 2003, finding Milroy's claim was compensable and awarded both temporary total disability (TTD) and permanent partial disability (PPD)[9] benefits. He found that Milroy had suffered work-related

[7] Dr. Lester mentions that he observed calluses on Milroy's hands and dirt under his fingernails which would indicate that he might be physically capable of more than he indicated in his exam. However, Barnes did not provide any further proof regarding this issue.

[8] Dr. Lester also provided a November 3, 2003, letter, as an addendum to his report, in which he recommended a reasonable period of temporary total disability to be eight to 12 weeks.

[9] Kentucky Revised Statutes (KRS) 342.0011(11)(c) defines permanent total disability as follows:

> [T]he condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury[.]

KRS 342.0011(34) defines work as "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy."

injuries on March 8, 2002, and May 16, 2002, but only the latter caused any impairment. The ALJ found that Milroy was temporarily totally disabled from May 17, 2002, through March 31, 2003.[10] The ALJ awarded Milroy a permanent partial disability impairment of 13%. Because he found that Milroy retained the physical capacity to return to the type of work he was performing at the time of his injury, he did not enhance Milroy's PPD benefits by a factor of three pursuant to KRS 342.730(1)(c)1.[11] Finally, the ALJ concluded that Milroy did not have a pre-existing, active condition. Both Barnes and Milroy filed petitions for reconsideration before the ALJ and both were overruled. Milroy then appealed and Barnes cross-appealed[12] the ALJ's opinion and award to the Workers' Compensation Board. The Board affirmed the ALJ's opinion in part and reversed in part.

[10] The Board remanded the case to the ALJ on the issue of TTD. The Board stated that, "[s]ince we are not satisfied the ALJ was aware of Dr. Lester's opinion addressing MMI, we cannot say with certainty the decision was made with a correct understanding of the evidence." However, this is not a subject of this appeal.

[11] KRS 342.730(1)(c)1 provides:

> 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[.]

[12] Milroy argued that the ALJ erred in failing to apply the three times multiplier of KRS 342.730(1)(c)1. Barnes argued that the ALJ erred in its conclusions regarding causation, the period of TTD, and active disability.

Only two issues are before this Court on the petition for review.

First, Barnes argues that the Board incorrectly affirmed the ALJ's findings of no pre-existing, active condition, by impermissibly acting as the fact-finder, as there was no substantial evidence to support the ALJ's findings. A claimant in a workers' compensation action bears the burden of proving the jurisdictional elements of his claim.[13] However, the burden of proving the existence of a pre-existing, active condition falls upon the employer and it is held to the same standard as a claimant.[14] Since Milroy was successful in persuading the ALJ on the issue of pre-existing active condition, the question on appeal is whether the evidence for Barnes was so overwhelming as to compel a finding in its favor.[15] For the evidence to be so compelling, it must be so overwhelming that no reasonable person could reach the same conclusion as the ALJ.[16]

It is well-established that "[a]s fact finder, the ALJ has the sole authority to determine the weight, credibility, and substance of the evidence and to draw reasonable inferences from

[13] Snawder v. Stice, 576 S.W.2d 276, 279 (Ky.App. 1979).

[14] Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky.App. 1984).

[15] Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418, 419 (Ky. 1985).

[16] REO Mechanical v. Barnes, 691 S.W.2d 224, 226 (Ky.App. 1985).

the evidence."[17] The Supreme Court has held:

> If the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made.[18]

Thereafter, the Worker's Compensation Board is charged with the responsibility of deciding "whether the evidence is sufficient to support a particular finding made by the ALJ, or whether such evidence as there was before the ALJ should be viewed as uncontradicted and compelling a different result."[19] In other words, the Board must determine whether there is substantial evidence in the record supporting the ALJ's findings. Substantial evidence has been defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men."[20] "The function of further review of the [Workers' Compensation Board] in the Court of Appeals is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling

[17] Transportation Cabinet, Dep't of Highways v. Poe, 69 S.W.3d 60, 62 (Ky. 2002) (citing KRS 342.285; and Paramount Foods, 695 S.W.2d at 418).

[18] Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

[19] Western Baptist Hospital, 827 S.W.2d at 687.

[20] Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971).

statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice."[21] Thus, this Court will reverse the Board only if Barnes can demonstrate that the evidence before the ALJ compelled a finding in his favor.[22]

Barnes originally contested Milroy's claim as not being work-related, asserting that Milroy's pain on May 16, 2002, was a continuation of the April 28, 2002, injury Milroy incurred at home, or that a large part of his disability following the May 16, 2002, incident was attributable to a pre-existing, active disability. Barnes argued that it was impossible for the ALJ to find that Milroy had no pre-existing, active condition as of May 16, 2002, because he had just returned to regular work duty the day of the accident and he felt "paralyzed" in his legs after the April 28, 2002, injury. Based on Dr. Murphy's report and Dr. Templin's impairment rating, we conclude that the ALJ reasonably found that Milroy had no pre-existing, active condition at the time of the May 16, 2002, accident.

Contrary to Barnes's position, the ALJ based his finding on medical evidence from Dr. Murphy and Dr. Templin. The ALJ quoted Dr. Murphy's opinion that Milroy was completely

[21] Western Baptist Hospital, 827 S.W.2d at 687-88.

[22] Paramount Foods, 695 S.W.2d at 419.

recovered when he returned to regular duty on May 16, 2002, as follows:

> The chart notes of Dr. Ted Murphy reflect treatment from March 11, 2002 to December 20, 2002. Dr. Murphy reports a history of seeing Mr. Milroy initially on March 11, 2002 following a work-related injury. He treated Mr. Milroy for a lumbar strain, sublaxations of L4 and 5 and myospasms. According to Dr. Murphy, Mr. Milroy fully recovered and was released on March 23, 2002. Dr. Murphy saw Mr. Milroy again on April 28, 2002 following an accident he had at home. He treated Mr. Milroy for a lumbosacral strain, subluxated right hip, mild sciatica into the right leg and myospasms of the low back. Mr. Milroy recovered and was released on May 10, 2002. Following his return to work, Mr. Milroy returned to Dr. Murphy on May 17, 2002 following a work-related accident. Dr. Murphy treated Mr. Milroy for subluxations of L1 and 2, subluxated right hip, disc herniation and bulging disc at L4 and 5, severe sciatica, edema and myospasms of the low back. According to Dr. Murphy, the last accident was much more severe in nature as compared to the previous two.

In support of the ALJ's finding, the Board referred to the report of Dr. Murphy and stated in part as follows:

> He explained that with the previous accident there was only a mild case of sciatica, and in the later accident when Milroy fell it caused the sciatic nerve to become compressed causing permanent bulging of the disc. Dr. Murphy believed the previous injuries were only moderate in nature compared to the last. While Milroy recovered from the previous conditions, the bulging disc would not resolve itself.

Barnes argues that the ALJ did not rely on Dr. Templin's report in finding no pre-existing, active condition. We disagree. The ALJ accepted Dr. Templin's 13% impairment rating and specifically explained why he chose the impairment rating of 13% over Dr. Lester's 5% rating. Dr. Templin found right leg radiculopathy. Dr. Lester just called it right leg pain. The principal differentiator between the D.R.E. lumbar category II and D.R.E. lumbar category III is the existence of radiculopathy. Dr. Templin did not apportion its rating, indicating he found no pre-existing, active condition.

Regardless, Barnes argues that Dr. Templin's report should not be considered because Milroy gave him an inaccurate history. However, Dr. Templin's report includes all of the prior injuries of Milroy with references to the type of injury and the condition of Milroy following each injury. Barnes states that Milroy lied when he stated that he had never had problems like this before and that he only had low back pain after the April 28, 2002, accident. Despite this, the medical evidence of record reflects that all three medical professionals formed their opinions with the awareness of Milroy's prior numbness.

Barnes states that Milroy gave conflicting descriptions of how the May 16, 2002, accident occurred. The only proof that Barnes has provided as to this discrepancy is

the testimony of Ramey as to the conversation that she had with Milroy after the incident. However, even Ramey's testimony was contradictory. Eight days after the injury, on May 22, 2002, she prepared the first Report of Injury. When asked at the hearing before the ALJ where she received the information to prepare the report, Ramey stated that she had spoken to Milroy by that time and he told her that his leg went numb and he fell down the stairs. To the contrary, Ramey also testified on direct that she did not speak to Milroy about the injury until four to five weeks later. When questioned about this inconsistency on cross-examination, Ramey admitted that the information she put in the report could not have been received from Milroy directly, but was received from the District Manager, Rita Yates. It is obvious that the cause of the May 16, 2002, accident is clearly in dispute, and thus the ALJ had discretion to determine whom he believed. Barnes argues that Milroy's testimony is not credible. In as much as the ALJ adjudged Milroy's testimony to be truthful, the Board and this Court are without authority to determine otherwise.[23] Barnes also contests Dr. Templin's statement that Milroy was treated for "mild" low back pain, "mild" sciatica, and "mild" muscle spasms, after the April 28, 2002, incident. However, this is consistent with what Dr. Murphy put in his notes.

[23] Poe, 69 S.W.3d at 62.

Barnes argues under Cepero v. Fabricated Metals Corp.,[24] that these inconsistencies caused Dr. Templin's conclusions as to a pre-existing, active condition to have no weight and failed to qualify as substantial evidence. We conclude the facts in Cepero are distinguishable from the present case. In Cepero, there was a complete omission of a past injury, leading the medical expert to find the claimant's injury to be entirely work-related. The medical expert testified that, had she known of the past injury, her opinion would have been different.[25] In this case, all medical experts knew about the April 28, 2002, injury and Milroy's resulting symptoms, prior to forming their opinions.

Barnes argues that Dr. Lester's opinion that 50% of Milroy's impairment was a pre-existing, active disability is "uncontroverted." Dr. Lester relied on the same information as Dr. Templin in preparing his report, except that he did not review the diagnostic test previously performed on Milroy, nor did he have a history of Milroy's injuries before March 8, 2002. Under Barnes's theory, Dr. Lester's opinion should be given no more weight than Dr. Templin's. Where the medical evidence is conflicting, the ALJ has "the sole authority to determine which

[24] 132 S.W.3d 839 (Ky. 2004).

[25] Id. at 841.

witness to believe."[26] The ALJ found the notes of Dr. Murphy and the report of Dr. Templin more persuasive than the report of Dr. Lester. We cannot conclude that this finding constituted error. Rather, the credibility of the evidence is well within the broad discretion of the fact-finder and the evidence did not compel a finding in Barnes's favor. Further, we conclude that the Board did not err in affirming the ALJ's opinion and award.

Secondly, Barnes argues that there was substantial evidence to support the portion of the ALJ's opinion and award finding Milroy had the ability to return to the type of work he was performing at the time of his injury, and that the Board incorrectly overturned this finding. The Board determined that the ALJ's findings were insufficient to apprise the Board and the parties of the basis of the decision concerning Milroy's ability to perform the work at the time of the injury and remanded the case to the ALJ for a determination of the actual physical requirements of Milroy's job at the time of the injury.

In concluding that Milroy retained the physical capacity to perform the type of work required at the time of the injury, the ALJ stated as follows:

> There are two factors which must be determined in order to properly calculate the benefit for permanent partial disability. The first factor is whether or

[26] Staples, Inc. v. Konvelski, 56 S.W.3d 412, 416 (Ky. 2001)(citing Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977)).

> not the claimant retains the physical capacity to perform the type of work done at the time of the injury. According to Dr. Lester, Mr. Milroy should be able to lift 50 pounds. According to Dr. Templin, he is able to lift 20 pounds. I am not convinced from the evidence that either of these restrictions would prohibit Mr. Milroy from performing the type of work he was doing at the time of the injury of grounds maintenance which involves sweeping, gathering trash, emptying trash cans, mowing, weeding, snow plowing, and salt spreading. Therefore, I conclude that he does retain the physical capacity to perform the type of work done at the time of the injury.

In order to properly determine Milroy's ability to return to the type of work he did prior to the accident, we must apply KRS 342.730(1)(c)1 and supporting case law. The construction and application of a statute are matters of law that may be reviewed de novo.[27] Although the Board and this Court must give deference to the ALJ's findings of fact, the Board and this Court may correct the ALJ where it has overlooked or misconstrued controlling statutes or legal precedent.[28]

We begin our analysis with reference to the relevant portions of the statutory provisions and supporting case law as noted by the Board in its opinion as follows:

> KRS 342.730(1)(c)1 provides that if the employee does not retain the physical capacity to return to the type of work he

[27] Louisville Edible Oil Products, Inc. v. Revenue Cabinet Commonwealth of Kentucky, 957 S.W.2d 272, 274 (Ky.App. 1997).

[28] Western Baptist Hospital, 827 S.W.2d at 687-88.

> performed at the time of injury, the award of benefits shall be enhanced by the factor of 3. In Ford Motor Co. v. Lynn, (2003 W.L. 22928431, Ky.App., ordered published and currently on appeal to the Kentucky Supreme Court), the Kentucky Court of Appeals held the use of the phrase "type of work" does not refer to "job classification." The critical inquiry is whether the claimant is physically capable of performing the same job he was performing at the time of injury and this analysis must take into account the component part of the claimant's job requirements. A proper analysis requires a comparison of the physical requirements of the pre-injury employment and post-injury employment capabilities based on the totality of the lay and medical evidence in the record. Carte v. Loretto Motherhouse Infirmary, Ky.App., 19 S.W.3d 122 (2000).

Barnes argues that the ALJ made a comparison of Milroy's restrictions assessed by both Dr. Templin and Dr. Lester and applied those to Milroy's and Ramey's descriptions of Milroy's job duties. Barnes argues that Dr. Lester's restrictions, coupled with the testimony of Ramey that there are positions available that do not require lifting over 50 pounds, constitutes substantial evidence in support of the ALJ's finding that Milroy is not entitled to the multiplier of three. However, this is not a correct statement of the law.

We agree with the Board that the ALJ failed to make findings setting forth the physical requirements of Milroy's job. Milroy testified that the grounds-keeping job included mowing, weed eating, weed pulling, and weed whacking creek

banks, trash pickup, walking around the premises to pick up the trash and pulling the trash cans. Milroy also performed maintenance in the garage using equipment such as buffers, mowers, and similar items, which required lifting as much as 200 pounds. In addition, Milroy testified that his job required lifting bags of salt during the winter that weighed 80 pounds. He also testified that during a big snow, the company would go through 4 or 5 pallets of salt in a week. This testimony is not disputed. Thus, the ALJ failed to correctly apply the law and only looked at the parts of Milroy's job that he could still perform, not his entire job description. The ALJ also relied on Ramey's testimony that there were jobs available at Barnes that did not require lifting over 50 pounds.

We agree with the Board's conclusions as follows:

> We agree with Milroy that the ALJ did not make sufficient findings concerning Milroy's ability to perform the work performed at the time of injury. The ALJ seemed to accept Ramey's testimony at face value that Milroy's job description did not require him to engage in heavy lifting. Milroy's description of his actual job duties included heavy lifting and the March 2002 injury occurred when Milroy was lifting a cigarette urn weighing 150 pounds. The ALJ made this finding of fact, though he determined it did not result in permanent impairment. We believe the ALJ's findings are insufficient to apprise this Board and the parties of the basis of his decision, and thus hampers our ability to conduct a meaningful appellate review. See Kentland Elkhorn Coal Corp. v. Yates, Ky.App., 743

> S.W.2d 47 (1988) and Shields v. Pittsburg and Midway Coal Mining Co., Ky. App., 634 S.W.2d 440 (1982). Therefore, this matter must be remanded to the ALJ for a determination of the actual physical requirements of Milroy's job at the time of injury, and based on the restrictions imposed by the physicians, determine whether Milroy retains the capability of returning to his former employment with Barnes.

We conclude that the Board did not err in vacating and remanding the ALJ's opinion and award in this case as to this issue.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, MICHAEL MILROY:

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