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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000769-WC

JOHN LUDKA — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-00-59597

M.G. CONSTRUCTION; HON. GRANT ROARK, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

AND NO. 2005-CA-000959-WC

M.G. CONSTRUCTION, INC. — CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-00-59597

JOHN LUDKA; HON. GRANT ROARK, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, KNOPF AND McANULTY, JUDGES.

GUIDUGLI, JUDGE: John A. Ludka petitions and M.G. Construction cross-petitions from an opinion of the Workers' Compensation Board which affirmed an opinion of the Administrative Law Judge. The Board ruled that the ALJ correctly concluded that Ludka failed to prove a worsening of his impairment on reopening, and that M.G. Construction failed to prove that Ludka was no longer entitled to the 3 multiplier under KRS 342.730(1)(c)1. For the reasons stated below, we affirm the Board's opinion.

We have closely examined the record, the written arguments, and the law. Because the reasoning which supports the Board's conclusion has been well-articulated in its opinion, we adopt the Board's opinion as written by Board Member Young as that of this Court. The Board stated in relevant part as follows:

> Ludka was injured on November 30, 2000, when he lost his footing and fell while working as a carpenter on a horse barn. Ludka sustained injury to his right hand, right leg, right wrist and head.
>
> Ludka settled his claim by agreement approved August 12, 2002. The agreement indicated Dr. Patrick had assessed a 26% functional impairment rating on June 20, 2002. The agreement reflected an average weekly wage at the time of injury of $480, and that Ludka had not returned to work after the injury. Medical treatment and vocational rehabilitation were left open. The agreement provided that if Ludka returned to work at equal or greater wages, the parties agreed that the provisions of

KRS 342.730 would apply. Ludka retained his right to reopen pursuant to the statute.

Ludka filed a motion to reopen on January 29, 2004. Ludka alleged that his condition had worsened from both an occupational and physical standpoint. He noted that on May 9, 2003, Dr. Russell Shatford performed a fusion on his right wrist. He noted he was now unable to make a fist and grip with his right hand and had no movement at all in his right wrist. The motion indicated he was unable to perform work of any kind and he had not been employed since May 9, 2003. He alleged a total disability. He further noted that Dr. Shatford had now assessed a 27% impairment for the right wrist. Ludka's affidavit in support of the motion indicated that after several unsuccessful attempts at finding work, he started working at South Park Country Club one week prior to the surgery date. He stated he has been unable to perform any kind of work since May 9, 2003, and is totally disabled.

A benefit review conference was held July 12, 2004. The benefit review conference order and memorandum indicated a stipulation that Ludka's wages currently earned were "540." As a result of the stipulation, M.G. Construction filed a motion to reopen and a motion to amend BRC order and memorandum to include the issue of whether Ludka was entitled to continued application of the 3 multiplier. The ALJ granted M. G. Construction's motion to reopen at the hearing held July 26, 2004.

Ludka testified by deposition and at the hearing. Ludka is a high school graduate and does not have any specialized or vocational training. His employment history includes work at a Hardee's Restaurant and stacking sod at Don Jackson Sod Company. He has worked framing houses for a number of employers.

Ludka testified that he was still having problems with his wrist when he settled his claim. Ludka testified that he worked for South Park Country Club at a rate of $8.00 an hour for forty hours a week after his injury. He was involved in cutting grass, weed eating, and performing basic grounds keeping. He stated that after his surgery on May 9, 2003, he was not able to perform his job duties at South Park Country Club. He stated he was not able to work the control levers on the riding mower. Ludka testified he tried to go back to doing carpentry work for Eagle Construction in March or April of 2004 but was unable to perform his duties. He was unable to continue working because his wrist continued to hurt due to the original injury. He stated he was unable to lift, use a hammer, climb, or crawl. Ludka is right-hand dominant, and he stated he could no longer pick up things from the floor with his right hand. He stated he was able to write his name but it was not the way it used to be. He has not used his left hand more than he did before the injury, but he drives with his left hand more now.

Ludka testified that he would like to undergo vocational rehabilitation. He was interested in computer drafting. He felt this would be a good area for him because he could already read blueprints. Ludka testified he did not believe he could go back to being a carpenter assistant because he could not hold utensils, write, or drive with his right hand. He stated he could move his fingers, but he could not make a complete fist and was unable to move his wrist. He stated it hurts when he writes.

At the hearing, Ludka testified that he had recently begun working for A.L. Post, Incorporated. He stated he began working for A.L. Post shortly after the deposition. A.L. Post is a construction company. He

stated his job involved light work. He would sweep floors, take things to the dumpster, pick up trash, and basically do general labor. He testified he earned $13.30 an hour and worked forty hours a week. He stated the employer knew about his injuries. Ludka was questioned about his ability to continue in the job for A.L. Post as follows:

> Q As far as you know, is there any reason why you would not be able to continue working for them?
>
> A Not unless they fired me.
>
> Q As you sit here today, are you in good standing, as far as you know?
>
> A Yes, as far as I know I am.

Ludka again indicated his interest in vocational rehabilitation and stated he was interested in computer-assisted drafting.

Dr. O.M. Patrick examined Ludka on May 11, 2002 at the request of Ludka's attorney. Dr. Patrick noted that initially Ludka's wrist was placed in a cast but as it healed, he had much wrist stiffness. In July, Dr. Shatford operated on the right wrist to shorten the ulna and apply a plate. He also did an arthroscopic debridement of the arthritis of the wrist. Then in October, he removed the ulnar styloid. Dr. Patrick noted Ludka's chief complaint concerning the wrist was stiffness of the right wrist. Dr. Patrick noted a past history of a fracture of the wrist as a teenager, but it healed, and Ludka stated he had a full range of motion after that injury. After a second fracture of the right wrist as a teenager, it was treated by closed casting, and he, again, attained a full range of motion. X-rays of the wrist showed a plate over the distal one-third of the radius, with healing

of the fracture, and a shortening was performed. There was a surgical absence of the ulnar styloid. There were arthritic changes seen at the articulation of the proximal carpal row and radial articulation. Dr. Patrick assigned a 24% impairment to the body as a whole as a result of loss of function of the right wrist. He combined the rating with a 3% rating for Ludka's knee condition, for a 27% impairment. Dr. Patrick restricted Ludka from performing activities requiring use of the right upper extremity for functions such as flexion, extension, or deviation of the wrist which would include using a hammer, drill or saw. He should also avoid other activities in the construction business with the wrist.

Ludka submitted evidence from Dr. Russell Shatford, his treating orthopedist. Dr. Shatford examined Ludka at the Kleinart Institute on October 28, 2003. He administered various grip strength tests. Dr. Shatford assigned a 27% whole body impairment. The rating consisted of impairment for loss of range of motion of the hand, wrist and elbow. The wrist accounted for a 30% upper extremity impairment for a total of 34% upper extremity impairment. He then combined the 34% for the upper extremity impairment related to the wrist and elbow with a 16% upper extremity impairment related to the hand for a 45% impairment of the upper extremity. This he converted to a total body impairment of 27%.

M.G. Construction submitted evidence from Dr. Frank S. Wood. Dr. Wood examined Ludka on May 18, 2004. Dr. Wood had previously examined Ludka on June 6, 2002. He noted that following the right wrist arthrodesis on May 9, 2003, Ludka had relief of complaints of pain in his wrist. He stated the wrist was now in a somewhat more favorable position than at the time of his previous evaluation. Dr. Wood stated there

was no change in the impairment computed at the time of his first evaluation. He stated no additional permanent restrictions were necessary. He felt Ludka had at least a sedentary work capacity, as defined in the Dictionary of Occupational Titles. He indicated that as a result of the improvement in the position of Ludka right wrist, as well as Ludka's lack of pain, Ludka should be able to function at least at the sedentary physical demand level and possibly higher. Dr. Wood stated Ludka still would not be able to use his dominant right hand for repetitive gripping or drafting or for fine manipulation at the elbow. Dr. Wood noted Ludka had no complaints of pain. Although he used his right upper extremity, he complained of weakness and of an inability to function as a carpenter. He also reported difficulty with picking up things and writing. Dr. Wood noted there was solid ankylosis of the right wrist. The motion in the right elbow was restricted. Dr. Wood assigned a 20% impairment to the whole person relative to the right upper extremity injury. This consisted of a 30% impairment of the right upper extremity for the successful wrist arthrodesis and 6% impairment to the upper extremity for his restricted pronation and supination of the right elbow.

The ALJ determined that Dr. Wood was the most credible regarding Ludka's impairment rating at the time of the settlement. It was, therefore, found that Ludka had a 20% impairment at the time he settled his claim. The ALJ then noted the parties' positions regarding Ludka's current wrist impairment. The ALJ then set forth the following analysis relevant to this appeal:

> However, the problem with plaintiff's proof is that there is no explanation for why Dr. Shatford included decreased hand

range of motion in his impairment rating calculation. Dr. Wood did not [include] hand range of motion studies, nor did plaintiff's own Dr. Patrick. Indeed, under Section 16.4g on pages 466-470 of the 5th Edition of the AMA Guides, there is no mention of including hand range of motion calculations to ankylosed wrists. While it is within the realm of possibility that a wrist injury could decrease range of motion in the digits of the hand itself, there is simply no explanation for doing so in plaintiff's proof. Rather, according to the AMA Guides, only wrist flexion and extension and radial and ulnar deviation are measured in determining wrist motion impairment. The Administrative Law Judge notes that Dr. Wood's report includes testing and findings consistent with methods prescribed by the AMA Guides. Conversely, Dr. Shatford provides no explanation for testing the range of motion of the individual fingers or otherwise including a separate impairment for the hand. Combined with the fact that Dr. Shatford provided no such opinion whatsoever that any such hand impairment is due to the work injury, the Administrative Law Judge is compelled to accept the findings of Dr. Wood because his testing followed the criteria used by Dr. Patrick previously and required by the AMA Guides. As such, it is determined that plaintiff's current impairment rating due to his right wrist injury is 20%. Because this is the same impairment as previously determined at the time of plaintiff's settlement, plaintiff

> has not proved a worsening of his impairment and his claim for increased benefits must be dismissed.

With regard to the multiplier issue, the ALJ noted that M.G. Construction was not arguing that Ludka was physically capable of returning to his former type of work, but rather was arguing that the 3 multiplier should no longer apply because Ludka had returned to employment at a greater wage than Ludka had earned at the time of injury.[1] Therefore, pursuant to Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), an analysis as set forth in Fawbush v, Gwinn, 103 S.W.3d 5 (Ky. 2003) was undertaken. The ALJ set forth his reasoning as follows:

> In this case, the Administrative Law Judge finds that the 3x multiplier remains the more appropriate multiplier. In doing so, the Administrative Law Judge accepts plaintiff's testimony as to his difficulty finding and maintaining employment since his injury due to his restrictions. While he is now employed at greater wages and he testified he expects to be able to continue in that employment, plaintiff has only been so employed for a few months. Because it is the defendant that moved to reopen to allege that the 3 multiplier no linger applies, the defendant bears the burden of proving that fact. Given that plaintiff has only been employed for a few months, that he can not return to his former employer, that neither his condition nor restrictions

[1] As noted previously herein, the prior settlement agreement provided that if Ludka returned to work at equal or greater wages, the provisions of KRS 342.730 would apply.

> have improved, the Administrative Law Judge finds that the defendant has failed to prove that plaintiff is no longer entitled to the 3x factor. As such, plaintiff's award of benefits shall continue unchanged.

M.G. Construction filed a petition for reconsideration, arguing that the ALJ misunderstood the basis of the reopening. By order rendered October 21, 2004, the ALJ denied M.G. Construction's petition for reconsideration. The ALJ again noted that under Kentucky River Enterprises v. Elkins, supra, he undertook the analysis described in Fawbush v. Gwinn, supra, to determine from the facts whether Ludka was likely to be able to continue earning, for the indefinite future, wages equal to or greater than those earned at the time of injury. The ALJ noted he had determined "the evidence was not persuasive from the defendant's perspective to render inapplicable the 3 multiplier." The ALJ stated he was not persuaded that the evidence before him showed that Ludka was likely to continue in his current employment earning the same or greater wages for the indefinite future. The ALJ again noted Ludka had been employed for only a few months at wages equal to or greater than those earned at the time of injury. Given that short period and the fact that it took Ludka a long time to find and maintain such a position, the ALJ believed it was too early to conclude that Ludka was likely to be able to continue in his current position for the indefinite future. Because of Ludka's short time in the job, the ALJ discounted Ludka's conjecture that he saw no reason why he could not continue in that job.

On appeal, Ludka argues the ALJ erred in rejecting the impairment rating by Dr, Shatford. He argues the ALJ failed to draw

reasonable inference from the proof. Ludka states there is proof that indicates he suffered a decrease in range of motion in his hand and that the loss of range of motion in his fingers and hands obviously exists, since Dr. Shatford measured it and assigned an impairment rating to it. Ludka contends that to infer it does not exist is completely unsupported by the record. Ludka contends the Board needs no medical experts to establish observable causation between his fused wrist and the loss of motion in his fingers. He notes that not even Dr. Wood disputed his loss of hand motion and that common sense requires that his loss of motion is directly related to his broken wrist. Ludka argues that if Dr. Wood provided no opinion concerning the loss of range of motion of the hand, and if no opinion otherwise exists in the record that the inclusion of a range of motion rating for the hand for a wrist injury is error, then Dr. Shatford's rating method is to be accorded the same degree of correctness as Dr. Wood's rating method, leaving the issue of which rating method is more appropriate to be weighed under provisions of the American Medical Association's Guides to the Evaluation of Permanent Impairment ("Guides"). Ludka argues the Guides requires the choice of Dr. Shatford's rating to 27% to the whole body.

Ludka further argues the ALJ misapplied the Guides. Ludka takes issue with that portion of the ALJ's analysis concerning Dr. Shatford's rating as set forth above. Ludka argues the ALJ created his own medical evidence and made his own medical determination based on a matter exclusively within the province of medical experts. Ludka then proceeds to give his interpretation of the Guides and how they allegedly support a finding in is favor. Ludka points to examples from the other sections of the Guides and argues Dr. Shatford's conclusion of the loss of motion

for the hand is entirely proper based on a reasonable interpretation of the Guides. Therefore, Ludka argues the ALJ must find a 27% impairment since the time of the settlement.

Since Ludka, the party with the burden of proof, was unsuccessful before the ALJ in proving an increase in his impairment, the issue on appeal is whether the evidence compels a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d (Ky.App. 1984). Compelling evidence is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224, 226 (Ky.App. 1985). It is insufficient for Ludka to point to evidence that would support a contrary conclusion. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). As Ludka acknowledges, the ALJ has the sole authority to judge the weight, credibility, substance and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

We find no merit in Ludka's arguments concerning the ALJ's selection of Dr. Wood's impairment rating rather than that of Dr. Shatford. The ALJ was faced with conflicting evidence concerning Ludka's functional impairment rating. The ALJ has the authority to choose whom and what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). On numerous occasions, this Board has stated that the proper way to challenge a doctor's impairment rating is to present medical testimony concerning the impropriety of the rating or to cross-examine the doctor. In this case, neither doctor critiqued the other doctor's rating. It must be remembered the selection of an impairment rating is a factual determination solely within the ALJ's role as fact finder. When, as here, there is conflicting medical

evidence, the discretion to choose whom to believe rests exclusively with the ALJ. Staples v. Konvelski, 56 S.W.3d 412 (Ky. 2001). The proper interpretation of the Guides and any assessment of an impairment rating in accordance with the Guides are medical questions. Kentucky River Enterprises, Inc. v. Elkins, supra. The ALJ does not have the authority to independently arrive at an impairment rating utilizing the Guides. The ALJ does not have the authority to consult the Guides when determining the weigh to be assigned to the evidence. Caldwell Tankes v. Roark, 104 S.W.3d 753 (Ky. 2003). While an ALJ may consult the Guides when determining the weight to be assigned to the evidence, he is never compelled to do so.

For its cross-appeal, M.G. Construction again argues Ludka is no longer entitled to the application of the 3 multiplier. M.G. Construction notes the original settlement agreement contained a stipulation that the average weekly wage at the time of the injury was $480 per week. On reopening, Ludka testified to working forty hours per week and earning $13.50 per hour, which translates into a weekly wage of $540. M.G. Construction argues that Ludka's testimony at the hearing that he was in good standing with his job and knew of no reason why he should not be able to continue working for his current employer and that the employer is fully aware of his injury and resulting limitations are sufficient to establish that he can continue to earn the same or greater wage for the indefinite future. M.G. Construction notes the Elkins and Fawbush cases do not focus on the duration of the new employment, but rather on whether the claimant is reasonably likely to be able to continue in that employment indefinitely into the future. The employer believes the evidence indicated that the employment was reasonably likely to continue. M.G. Construction argues that it is irrelevant

whether Ludka could return to his former employment or whether his condition or restrictions have improved. The proper focus, M.G. Construction argues, is strictly on the claimant's wages being earned in the current employment and whether the claimant is likely to be able to continue in that employment. M.G. Construction states it is unaware of any indication in the statute or case law that a claimant's return to work at the same or higher wage must be of a particular duration in order to justify withdrawing the 3 multiplier.

KRS 342.730(1)(c)1 and (1)(c)2, provide, respectively, as follows:

> 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.

The Supreme Court in Fawbush v. Gwinn, supra, concluded that in those instances which either KRS 342.730(1)(c)1 and (1)(c)2 might apply, an ALJ is authorized to determine which provision is more appropriate based upon the facts of the claim. Id., at 12. In Fawbush, the claimant's unrebutted testimony indicated that the post-injury work he performed was done out of necessity, was outside his medical restrictions, and was possible only when he took more narcotic pain medication than prescribed. Based upon those facts, the Court stated that a decision to apply (1)(c)1 was reasonable. Id.

In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), the Supreme Court found it necessary to remand for a determination of the claimant's average weekly wage following his return to work. The Court stated that if the ALJ determined Elkins earned the same or greater wage as he had at the time of his injury, "the ALJ must then apply the standard that was set forth in Fawbush v. Gwinn, supra, to determine from the evidence whether he is likely to be able to continue earning such a wage for the indefinite future and whether the application of paragraph (c)1 or 2 is more appropriate on the facts."

As the party seeking relief from the 3 multiplier on reopening in the present claim, M.G. Construction had the burden of proof before the ALJ on that issue. Since the issue arose shortly before the hearing, the parties developed little proof on the issue other than the few questions posed to Ludka at the hearing. The ALJ was certainly

free to attach little weight to the statement by Ludka that as far as he knew, he was in good standing with his employer. We believe the ALJ could appropriately consider and draw reasonable inferences from the brief length of Ludka's return to employment at the same or greater wages. After all, Ludka had a history of several brief attempts at returning to employment but an inability to sustain employment, and Ludka's testimony supports a conclusion that his inability to sustain that prior employment resulted from his work injury.

In Adkins v. Pike Co. Bd. Of Education, 141 S.W.3d 387 (Ky.App. 2004), the Court stated, "[I]n determining whether a claimant can continue to earn an equal or greater wage, the ALJ must consider a broad range of factors, only one of which is the ability to perform the current job." The evidence concerning Ludka's historical inability to sustain employment post injury, coupled with the very short duration of his current employment as of the time of the ALJ's decision herein, supports the ALJ's determination on reopening that Ludka cannot continue to earn the same or greater wage for the indefinite future. Since the ALJ's determination that Ludka failed to prove on reopening that the 3 multiplier should no longer apply is supported by substantial evidence, we are unable to conclude otherwise. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Further, we note that Ball v. Big Elk Creek Coal Co., Inc., 25 S.W.3d 115 (Ky. 2000) makes clear that KRS 342.730(1)(c)2 contemplates a comparison of pre-injury and post injury average weekly wages, not a week by week analysis and adjustment of post-injury wages. Ordinarily, as in Ludka's case post injury, when wages are fixed by the hour, average weekly wage is computed based on a thirteen week period. KRS 342.140(1)(d). At the time of the hearing

> on reopening below, Ludka had been employed in his most current job for less than thirteen weeks. This, too, lends support, we believe, to the ALJ's determination that . . . it was too soon to conclude Ludka could continue to earn the same or greater wage for the indefinite future.
>
> M.G. Construction argues on appeal that by the time the ALJ issued his opinion herein, Ludka had worked for four months in his current job at the same or greater wage. Ludka counters that there is no evidence of record that he continued to be employed in his most current position at the same or greater wage subsequent to the date of the hearing below. Ludka also asserts in his reply brief that the respondent's attorney was informed, after the filing of the notice of appeal, that Ludka's employment had ceased. M.G. Construction objects in its reply brief that there is no such evidence of record. Pursuant to KRS 342.285(2), no new or additional evidence may be introduced before the Board except as to the fraud or misconduct of some person engaged in the administration of Chapter 342, and the Board shall hear the appeal upon the record as certified by the Administrative Law Judge. Hence, we have confined our analysis herein to the evidence which was presented for the ALJ's consideration, and have inferred nothing about Ludka's employment status beyond the date of the final hearing.

The Board went on to affirm the decision of the ALJ, and dismiss Ludka's appeal and M.G. Construction's cross-appeal. Having been persuaded by the Board's reasoning and adopting it as that of this Court, and for the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

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