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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000800-WC

R & S BODY COMPANY, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD CLAIM NO. WC-02-02148

JOHN T. McCOY;
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE AND GUIDUGLI, JUDGES; PAISLEY, SENIOR JUDGE.[1]

PAISLEY, SENIOR JUDGE: R & S Body Company, Inc. (R & S) has petitioned this Court for review of an opinion of the Workers' Compensation Board affirming a decision of an Administrative Law Judge (ALJ) that awarded John McCoy tripled permanent partial disability benefits under KRS 342.730(1)(c). R & S maintains that the ALJ did not have sufficient evidence to meet the

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

standard established in Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) for awarding such enhanced benefits. In the alternative, R & S argues that the holding in Fawbush should be modified or reversed. Because we find that the Board did not err in determining that there was sufficient evidence supporting the ALJ's award of tripled benefits, and because we must follow the precedents established by our state Supreme Court, we affirm.

McCoy was born in 1955. He has a tenth-grade education and has earned a GED. He has no specialized or vocational training. Since 1985, McCoy has been employed by R & S as a production welder of truck bodies. In his deposition, he described the work as heavy and demanding because a production quota must be met every day.

McCoy began experiencing neck and upper back pain in the 1990s, and was told in 2000 that he had a bulging disk in his neck. His family physician began treating him for the neck condition, and imposed a thirty-five pound lifting restriction. McCoy then suffered three injuries at work. The first occurred on April 18, 2001, when he fell from a ladder while welding. He experienced lower back pain at that time, but it was not severe enough to make him leave work. Then, on January 14, 2002, he fell from the deck of a truck bed, a distance of about three feet. He landed on his hips and lower back. He testified that he experienced pain in the same area as before, but that it was

much more severe. He consulted his family physician, who referred him to a pain management specialist. Finally, on May 17, 2002, McCoy fell from the back of a truck bed, again landing on his lower back. Against his doctors' advice, McCoy did not miss work following any of his injuries because he could not afford to do so. At the time of his hearing, he was still performing the same job at R & S.

McCoy currently experiences back pain with accompanying pain and numbness in his left leg. He has trouble getting up and down and sitting for long periods. He finds it difficult to weld beneath tailgates, and he can no longer weld the tailgates themselves because they are far heavier than his current twenty-five pound lifting restriction. He works scarcely any overtime hours now. He has stated that he wants to continue working for as long as he possibly can. McCoy testified that although he had complained of lower back pain to his physicians for years, he felt that his more severe back pain and problems did not begin until after the second work injury of January 14, 2002.

The ALJ found that McCoy's fall from the truck bed on January 14, 2002, was a compensable injury. He assessed an impairment of 8% under the AMA Guidelines and found McCoy to have a 6.8% permanent partial disability. He further concluded that as a result of the injury, McCoy would be unable to

continue the type of work he was doing into the indefinite future and therefore awarded him a tripling of his benefits pursuant to KRS 342.730(1)(c)1.

R & S appealed to the Workers' Compensation Board on the sole issue of whether there was substantial evidence to support the ALJ's conclusion that McCoy did not retain the physical capacity to return, for the indefinite future, to the type of work he was performing at the time of the injury. The Board affirmed the ALJ's decision, and this petition for review followed.

The duty of this Court is to correct the Board only where it 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, 827 S.W.2d 685, 687-88 (Ky. 1992); Whittaker v. Rowland, 998 S.W.2d 479, 482 (Ky. 1999).

KRS 342.730(c) provides, in relevant part, that:

> 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 . . . ; or
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> 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.

In Fawbush v. Gwinn, our Supreme Court held that paragraph (c)2 of the statute does not take precedence over paragraph (c)1. In other words, if an employee returns to work after an injury at an equal or higher weekly wage, he or she is not automatically ineligible for the triple multiplier. The Court reasoned as follows:

> [T]he legislature did not preface paragraph (c)2 with the word "however" or otherwise indicate that one provision takes precedence over the other. We conclude, therefore, that an ALJ is authorized to determine which provision is more appropriate on the facts. If the evidence indicates that a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future, the application of paragraph (c)1 is appropriate.

R & S argues that there was no evidence presented that McCoy is unlikely to be able to continue earning a wage that equals or exceeds his wage at the time of the injury for the indefinite future. Dr. James Templin, a specialist in occupational medicine and chronic pain management, stated that

McCoy would have difficulty continuing in his present employment, but R & S has pointed out that Dr. Templin nevertheless assessed no permanent restrictions. Similarly, although Dr. Shriram Iyer,[2] another pain management specialist, concluded that McCoy did not retain the physical capacity to return to his work as a welder, R & S contends that this was a "conclusory" statement and that there was no evidence that Dr. Iyer understood the type of work that was being performed by McCoy. R & S presents as further evidence of McCoy's ability to continue earning the same or greater wages the fact that he returned to work after each of his work injuries, and that he had modified his work behavior due to back problems well before the January 14, 2002 injury.

In arriving at his decision, the ALJ relied on Dr. Templin's opinion and on McCoy's own testimony regarding his pain and the difficulty he has welding beneath tailgates and lifting tailgates. ALJ concluded that

> [t]he plaintiff is clearly working beyond his restrictions and is suffering on a daily basis as a result thereof. The plaintiff has proven himself to be a valued worker as he has worked over the years through bouts of cervical and lumbar pain as a welder doing heavy manual labor work. The plaintiff now suffers a herniated disc and has restrictions against doing much of the work he has done in the past although his testimony indicates that he desires to do so

[2] Appellant has spelled the name "Iyler" although the record indicates that the doctor's surname is Iyer.

> as long as he is able. The facts of this case point to the fact that the plaintiff will not be able to continue this type of work into the indefinite future and therefore, the multiplier set forth at KRS 342.730(1)(c)(1) is appropriate[.]

In reviewing the ALJ's findings and conclusions, we note that "the ALJ, as fact-finder, has the sole authority to judge the weight, credibility and inferences to be drawn from the record." Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329, 331 (Ky. 1997). "The fact-finder may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof." Magic Coal Co. v. Fox, 19 S.W.3d 88, 96 (Ky. 2000). R & S has acknowledged the broad discretion granted to the ALJ as factfinder, but alleges that this power "can be too readily abused."

We find no such abuse in this case. The record shows that both Dr. Templin and Dr. Iyer opined that McCoy would be unable to continue his employment as a welder. Although, as R&S has noted, Dr. Templin did not impose permanent restrictions, he also provided the following testimony:

> Mr. McCoy should avoid activities requiring extensive or repetitive bending, stooping, kneeling, crouching, lifting, carrying or climbing. He should avoid lifting or carrying items weighing greater than 20 pounds from waist level for any extended distance or time. He should also avoid lifting items weighing greater than 10

> pounds from floor level or doing any repetitive lifting from floor level. He should avoid repetitive use of foot controls or riding in or on vibratory vehicles for any extended distance or time. And when I note these activities what I'm saying is that I believe these activities, if he engages in them, will result in increased pain and ultimately prevent him from continuing his work activities.
>
> . . .
>
> Consideration should be given to vocational training or additional education in another area where the functional job duties are more consistent and compatible with his present medical condition.

As to R & S's contention that Dr. Iyer was unaware of the type of work McCoy was performing at the time of the January 2002 injury, and therefore unable to give an informed opinion, we observe that Dr. Iyer's report clearly states that McCoy is "a skilled laborer and has worked as a welder for the past several years."

R & S further argues, however, that even if one were to assume that the January 2002 injury resulted in some modification in McCoy's ability to engage in the work he was performing before the injury, there is no evidence, nor can any inference be drawn from the existing evidence, that it affected his ability to earn equal or greater wages for the indefinite future. R & S points out that the Supreme Court in Fawbush and thereafter in Kentucky River Enterprises v. Elkins, 107 S.W.3d

206 (Ky. 2003), recognized that an individual may lack the physical capacity to return to his prior work but may still possess the capability of earning the same or greater wages for the indefinite future. See Elkins, 107 S.W.3d at 211. R & S claims that the ALJ failed to make a finding regarding McCoy's future wage-earning potential, and that the Board consequently shored up the lack of evidence by embarking on an improper fact-finding mission to fill the evidentiary void.

R & S refers specifically to the Board's treatment of the evidence regarding the lifting restrictions placed on McCoy and the Board's statement that it is "implied" in the evidence that McCoy could work on tailgates before his injury.

It is undisputed that McCoy had had restrictions placed on the amount he could lift well before the January 2002 injury. R & S claims that the Board overstepped its role as a reviewing body when it wrote that prior to the injury McCoy was not "absolutely precluded" from lifting heavier objects, and that it was "implied" that he had been able to work on tailgates before his low back injury. Our review of the record indicates that there was some reduction in the amount of weight that his physicians recommended McCoy could lift before and after the injury. We also see no error in the Board's comment that the ALJ was acting within his discretion in relying on McCoy's own testimony that he now does not lift more than twenty-five

pounds, nor in its conclusion that this implies that he was not absolutely precluded from lifting heavier objects before the lower back injury.

As to the evidence regarding the tailgates, McCoy testified as follows at the hearing:

> Q. Do you still do the same job you did at the time you got hurt?
>
> A. No, I don't weld tailgates no more.
>
> Q. Why is that?
>
> A. Because I can't stand the lifting and tugging on them.

On the basis of this evidence, we do not agree with R & S that it was an impermissible inference for the Board to state that it was implied in McCoy's testimony that he had been able to work on tailgates before his injury.

Moreover, the Board also stressed the following evidence as supporting the ALJ's opinion:

> Beyond these lifting restrictions, there are multiple limitations on McCoy's other work activities that are entirely disregarded by R & S in its argument. These include, most notably, limitations on bending, stooping and crawling, all of which are required of McCoy in his work as a production welder of truck bodies. McCoy testified at the final hearing that he avoids these activities to the extent he is able, though that is not always the case. Contrary to R & S' assertion that there is no evidence that McCoy labors in pain and has difficulty performing his work, McCoy's testimony at the final hearing reveals that he gets "to

> where [he] can't function" whenever he bends, stoops, crawls, and lifts. McCoy testified that sometimes he goes home after work and spends the entire evening sitting and doing nothing because of the pain. He also has difficulty sleeping at night because he cannot find a comfortable position because of low back pain. Dr. Templin expressly testified that, because of his low back injury, some of the tasks required of McCoy's work as a welder "will result in increased pain and ultimately prevent him from continuing his work activities."

As to R & S's contention that the Board improperly tried to compensate for the ALJ's failure to address the question of whether McCoy could continue to earn the same or greater wage for the indefinite future, we note that the ALJ clearly articulated the Fawbush standard at the beginning of the paragraph wherein he explained why he was applying the triple multiplier. The ALJ was not required to restate that standard again at the end of the paragraph.

As to R & S's argument that Fawbush v. Gwinn should be overruled, we are constrained by the Rules of our Supreme Court which plainly state that "[t]he Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court." SCR 1.030(8)(a)

For the foregoing reasons, the opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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