RENDERED: FEBRUARY 17, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001375-WC

MUNOZ BROTHERS, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-03-01413 & WC-03-94378

VIDAL ESCOBAR; WILLSTAFF WORLDWIDE
STAFFING; HON. ANDREW MANNO,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM AND McANULTY, JUDGES; PAISLEY, SENIOR JUDGE.[1]

BUCKINGHAM, JUDGE: Munoz Brothers, Inc., petitions for our review of an opinion by the Workers' Compensation Board (Board) affirming an opinion and award by an administrative law judge (ALJ) in favor of an injured worker, Vidal Escobar. Munoz

[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.

Brothers contends that the apportionment of benefits payable to Escobar between it and Willstaff Worldwide Staffing was erroneous. We affirm.

At the time of the hearing before the ALJ, Escobar was 40 years old, had no formal education, and was not fluent in English. He came to the United States from El Salvador in 1989. In El Salvador, he had worked on a farm.

Escobar worked for Willstaff, a temporary employment agency, from October 2001 until he was injured in January 2002. On January 16, 2002, Escobar was struck by a 55-pound bag of laundry while working in a hospital under the employ of Willstaff. The bag had flown out of a laundry chute and struck Escobar in the back while he was bending over to pick up dirty laundry. Escobar claimed he immediately experienced pain in his hip, back, and leg. X-rays were taken at the hospital, and Escobar did not return to work until the next day. However, he could not continue to work when he returned because the pain was so intense. He sought additional medical treatment and later returned to work briefly doing light cleaning.

In January 2003, Escobar went to work for Munoz Brothers doing clean-up work at Rupp Arena in Lexington. On January 29, 2003, he suffered another injury to his low back. He testified that he was lifting an aluminum table that weighed approximately 55 pounds when he felt a strong pain in his back

and hip. He received medical treatment for this injury, but when he attempted to go back to work, Munoz Brothers had no work for him. His employment ended sometime in February 2003.

Escobar filed claims in connection with the separate back injuries. The ALJ considered the testimony of Dr. Tony Perez, Dr. Thomas Menke, Dr. Gregory T. Snider, and Dr. Robert B. Nickerson. Dr. Nickerson had performed his evaluation at the University of Kentucky after the ALJ had ordered a university evaluation pursuant to KRS[2] 342.315.

The ALJ found that the parties did not offer sufficient evidence to overcome the presumptive weight afforded the opinions of Dr. Nickerson. See KRS 342.315(2). Therefore, the ALJ adopted the 12% impairment rating of Dr. Nickerson. As Dr. Nickerson had concluded that an 8% rating was attributable to the January 2002 injury and a 4% rating attributable to the January 2003 injury, the ALJ adopted the finding of Dr. Nickerson as an accurate reflection of the appropriate apportionment between the two injuries.

Next, the ALJ found that Escobar did not retain the physical capacity to return to the type of work performed at the time of the January 2002 injury or the 2003 injury. However, the ALJ found that Escobar did retain the physical capacity to return to the work he performed at the time of his first injury.

[2] Kentucky Revised Statutes.

Then, there being no evidence that Escobar had returned to work after either injury at equal to or greater wages, the ALJ determined that the three-multiplier provision in KRS 342.730(1)(c) did not apply. Munoz Brothers appealed to the Board, which affirmed the ALJ. This petition for review followed.

Pursuant to Campbell v. Sextet Mining Co., 912 S.W.2d 25 (Ky. 1995), and Fleming v. Windchy, 953 S.W.2d 604 (Ky. 1997), Escobar received a permanent partial disability award of 8% against Willstaff and a total disability award against Munoz Brothers with an offset for the 8% permanent partial disability award. Thus, Escobar recovered the sum of $13.63 per week against Willstaff, commencing August 5, 2002, and continuing thereafter for a period not to exceed 425 weeks. Against Munoz Brothers, Escobar recovered the sum of $150 per week commencing November 2, 2003, and continuing for so long as he remains totally disabled.

Munoz Brothers' argument in its petition for review is that the ALJ erred by not enhancing the award against Willstaff by the three multiplier. Specifically, Munoz Brothers argues that the ALJ erred when he determined that Escobar retained the physical capacity to return to his work in the hospital laundry room following the first injury and thus failed to apply the three-multiplier provision in the statute.

"The function of further review of the [Board] in 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 Hosp. v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992). "[T]he ALJ, as fact-finder, has the authority to believe part of the evidence and disbelieve other parts, even when it came from the witness or the same adversary party's total proof." Roberts v. Estep, 845 S.W.2d 544, 547 (Ky. 1993). "When one of two reasonable inferences may be drawn from the evidence, the finders of fact may choose." Jackson v. General Refractories Co., 581 S.W.2d 10, 11 (Ky. 1979).

As the Board noted, Munoz Brothers had the burden of proving the application of the three-multiplier to the impairment rating assessed for Escobar's injury with Willstaff. Since Munoz Brothers was unsuccessful, the question on appeal is whether the evidence is so overwhelming as to compel a finding in its favor. See Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418, 419 (Ky. 1985).

Munoz Brothers argues that the evidence compels a finding that Escobar did not have the physical capacity to return to his work in the hospital laundry after his first injury and, therefore, that the three-multiplier provision of

the statute should apply to the award against Willstaff. Such a finding would change the percentage of the total award for which Willstaff would be responsible from roughly 8% to roughly 24%, thus increasing the amount of the offset from the award against Munoz Brothers by roughly 16%.

As the Board noted, the standard for the application of the three-multiplier is whether the claimant lacked the physical capacity to return to the same type of work he performed at the time of injury. See Ford Motor Co. v. Forman, 142 S.W.3d 141, 145 (Ky. 2004). The issue of the claimant's physical capacity and the application of the three-multiplier is based on both lay and medical evidence in the record. Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122, 126 (Ky.App. 2000).

The Board analyzed the evidence as follows:

> As indicated above, there was simply a dearth of evidence concerning Escobar's job duties with either Willstaff or Munoz Brothers. He was never fully questioned concerning the component parts of the jobs he performed. Though Escobar testified he could no longer work at Saint Joseph Hospital, that testimony, standing alone, compels no particular result.

We agree with the Board's conclusion that it stated as follows:

> The ALJ was left with medical testimony which indicated Escobar had indeed been released to return to work after that injury. Faced with this evidence, we believe the ALJ did not err in his

> determination that the three multiplier did not apply. The evidence falls short of compelling a finding that Escobar was unable to return to his former employment with Willstaff after the first injury . . . We cannot say the ALJ's decision was so wholly unreasonable that it must be reversed as a matter of law.

The Board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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