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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000974-WC

PAMELA CONELY — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-05-96849

FORD MOTOR COMPANY;
HON. MARCEL SMITH, ALJ;
and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: DIXON AND KELLER, JUDGES; GRAVES,[1] SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Pamela Conely petitions for the review of an opinion of the Workers' Compensation Board (Board), entered April 13, 2007, affirming the decision of an Administrative Law Judge (ALJ) denying an enhancement of her award by either multipliers pursuant to KRS 342.730. We affirm.

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

In November 2004, Conely developed bilateral carpal tunnel syndrome while working as a vehicle assembly technician for Ford Motor Company (Ford). Dr. Kathleen Harter at the UAW-FORD Physical Rehabilitation Center treated Conely and ordered work restrictions including no gripping, grasping, squeezing, use of vibratory tools, or repetitious finger movement bilaterally. Dr. Harter referred Conely to Dr. Margaret Napolitano and Conely subsequently underwent right and left carpal tunnel release surgery in January and March 2005. On May 5, 2005, Dr. Napolitano's medical notation stated that "[Conely] will return to regular work today. She has no impairment and she is at [maximum medical improvement]."

Thereafter, Conely returned to work as an assembly technician installing seat belts. Conely alleges that she began to again experience problems with her hands and wrists bilaterally and returned to Dr. Harter. Dr. Harter again imposed work restrictions through June 30, 2005, and later imposed permanent work restrictions on August 9, 2005 and noted that Conely "will need job reassignment." Conely's new job assignment accommodated her work restrictions, however, it did not allow her to work overtime and although her hourly wage increased, her average weekly wage was less than her pre-injury weekly wage.

Conely's claim against Ford for benefits included the independent medical evaluation report of Dr. Richard DuBou, dated April 6, 2006. Dr. DuBou diagnosed work-related carpal tunnel syndrome and assigned a 7% whole body permanent impairment. After reviewing the evidence, the ALJ found Dr. DuBou's medical opinion

persuasive and supported by objective medical evidence. However, the ALJ went on to conclude that the multipliers pursuant to KRS 342.730(1)(c)(1) and (2) were not applicable.

Based upon these findings, the ALJ awarded Conely just the 7% impairment rating without enhancement. Conely filed a Petition for Reconsideration requesting a finding that she could not return to work in her previous occupation because of the permanent restrictions imposed by Dr. Harter. The ALJ denied Conely's petition on December 12, 2006. Following the denial, Conely filed a timely appeal with the Board. On April 13, 2007, the Board affirmed the decision of the ALJ. This appeal followed.

Conely argues that the ALJ erred when she failed to enhance Conely's award by either multiplier available under KRS 342.730. We disagree.

KRS 342.730 provides, in relevant part, as follows:

> (1) Except as provided in KRS 342.732, income benefits for disability shall be paid to the employee as follows:
> . . . .
> (c) 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.

In determining that neither multiplier was applicable, the ALJ stated:

> I am also persuaded by [Conley's] return to employment. I find that [Conley] retains the physical capacity to return to the type of work she performed at the time of injury. KRS 342.730(1)(c)1 is not applicable. KRS 342.730(1)(c)2 is also not applicable. Although [Conley] is earning a higher hourly rate, she has not earned an average weekly wage equal to or greater than her average weekly wage at the time of the injury.

The Supreme Court of Kentucky, in *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985), held the fact-finder, rather than the reviewing court, has sole discretion "to determine the quality, character and substance of the evidence presented...." Furthermore, where there is conflicting medical testimony, an ALJ, as the finder of fact, may reject any testimony and believe or disbelieve various parts of the evidence. *See Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky. 1977). So long as the ALJ's decision is supported by substantial evidence, the fact that contrary evidence in support of an opposite finding was presented is insufficient to reverse on appeal. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46 (Ky. 1974).

In this case, the ALJ was fully aware of Dr. Harter's subsequent order of permanent restrictions. Nevertheless, Conely was able to return to the *type* of work she did before her injury. Moreover, the evidence presented clearly shows that the type of

work Conely performed after being placed on permanent restrictive duty was not minimal. *See Central Kentucky v. Wise*, 19 S.W.3d 657(Ky. 2000)(unreasonable to terminate the benefits of an employee released to perform minimal work). KRS 342.730(1)(c)(1) does not require that an employee be able to return to the *exact* job she had prior to the injury. Additionally, the record reveals that upon her return to work, Conely was not earning an average weekly wage equal to or greater than her pre-injury wage. Consequently, KRS 342.730(1)(c)(2) is inapplicable.

Based on our review of the record, we believe the ALJ had substantial evidence to conclude that Conely was not entitled to the income multipliers available pursuant to KRS 342.730. Accordingly, because there is substantial evidence to support the ALJ's findings, we must affirm the Board's decision.

The April 13, 2007, decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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