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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002058-WC

GENERAL ELECTRIC COMPANY

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-96980

CATHERINE A. CONDER; HON. LONDON
OVERFIELD, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER, THOMPSON, AND WINE, JUDGES.

THOMPSON, JUDGE: General Electric Company appeals a decision of the
Workers' Compensation Board affirming an Administrative Law Judge's (ALJ)
decision. For the reasons stated herein, we affirm.

Catherine Conder, who was employed as a computer programmer for General Electric, filed a workers' compensation claim for hypersensitivity pneumonitis. General Electric denied liability for Conder's claim. After a benefit review hearing, the ALJ awarded Conder permanent partial disability payments due to her occupational disease (hypersensitivity pneumonitis) but decided against applying the 3-multiplier under KRS 342.730(1)(c) to her award. Specifically, the ALJ found the following:

Based on the opinions of Dr. Wintermeyer and the testimony of the Plaintiff, I find that Plaintiff does retain the physical capacity to return to the type of work she was performing at the time of her injury. Plaintiff is physically capable of performing the work. She cannot, however, return to the type of environment in which the work was performed. Therefore, I find that... Plaintiff's permanent partial disability benefits will not be enhanced.

After both parties appealed, the Workers' Compensation Board issued an order affirming the ALJ's decision with respect to every issue except its application of the 3-multiplier. In Case No. 2005-CA-002504-WC, this Court affirmed the Board's decision. In our opinion, this Court wrote the following:

Despite ruling favorably for Conder on the work-related-disability issue, the ALJ found that, based on the testimony of her own expert witnesses, Conder still "retains the physical capacity to return to the type of work she was performing at the time of her injury, just not in the same work environment." Consequently, the ALJ did not apply a 3-multiplier to Conder's disability as required under KRS 342.730(1)(c) 1 for an employee that "does not retain the physical capacity to return to the type of work that the employee performed at the time of the injury."

In pertinent part, KRS 342.730(1)(c)1 states:

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

And, in *Ford Motor Co. v. Forman*, 142 S.W.3d 141, 145 (2004), the Kentucky Supreme Court ruled that: [B]oth the 1996 and 2000 versions of KRS 342.730(1)(c) 1 provide an enhanced benefit for those who lack the physical capacity to return to the type of work performed at the time of injury. When used in the context of an award that is based upon an objectively determined functional impairment, “the type of work that the employee performed at the time of injury” was most likely intended by the legislature to refer to the actual jobs that the individual performed.

Moreover, the Court further held that proof of a claimant's ability to perform some jobs within a specific job classification does not necessarily indicate that he retains the physical capacity to perform the same type of work that she performed at the time of injury. In applying these two controlling authorities, we find that the Board correctly remanded the ALJ's decision on the 3-multiplier issue. *Indeed, under these authorities, the question is whether Conder retains the capacity to return to the actual jobs she performed at the time of injury or, stated another way, whether Conder can continue in the specific livelihood at General Electric to which she devoted 17 years of her career.* [Emphasis added].

Here the record shows that, though Conder is generally trained as a computer programmer, her actual job duties at the time she contracted an occupational lung disease were those of a manufacturing machine programmer working in the aircraft engine manufacturing industry, which is a very specialized career niche that she held for 17 years. Consequently, the Board has correctly indicated that the question that the ALJ needs to answer

on remand is not whether Conder can work as a computer programmer in a different environment than at General Electric but rather whether Conder now retains the capacity to work in the same or similar manufacturing environment in the aircraft engine manufacturing industry performing the same duties as those performed at General Electric. *See Ford Motor Co. v. Forman*, 142 S.W.3d 141, 145 (2004) (construing KRS 342.730(1)(c) 1.).

On remand, the ALJ found that Conder could not perform the same or similar duties as she did in her previous work with General Electric. Accordingly, the ALJ found that Conder “should be awarded enhanced benefits based on the fact that she cannot return to a manufacturing environment in [the] aircraft engine manufacturing industry as to do so would require her to be exposed to metal working fluids,” which caused her occupational disease. Accordingly, the ALJ enhanced Conder’s permanent partial disability benefits by the 3-multiplier pursuant to KRS 342.730(1)(c)1. The Board affirmed the ALJ, and this appeal followed.

General Electric contends the ALJ’s decision to alter his original decision to find that Conder was entitled to benefits pursuant to KRS 342.730(1)(c)1 was improper. General Electric contends there is absolutely no evidence that Conder cannot perform the essential functions of her previous job. Additionally, General Electric contends that Conder can perform her previous job at a different location than General Electric and, thus, the 3-multiplier was inapplicable to her case. We disagree.

We review workers' compensation cases in accordance with the standard stated in *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-688 (Ky. 1992). Under this standard, an appellate court cannot correct the Board unless its assessment of the evidence is so flagrant as to cause gross injustice. *Id.* at 688. Further, in workers' compensation cases, an appellate court gives no deference to the Board's and ALJ's application of the law. *Newberg v. Thomas Industries*, 852 S.W.2d 339, 340 (Ky.App. 1993).

In our previous opinion in this case, we stated that the ALJ was required to determine "...whether Conder can continue in the specific livelihood at General Electric to which she devoted 17 years of her career." If Conder could not continue in the specific livelihood as she maintained at General Electric, the 3-multiplier would be applied to enhance her award. If she could continue in the specific livelihood as she maintained at General Electric, the 3-multiplier would not be applied to her award. While General Electric contends that the legal question should be whether Conder can perform the "essential functions" of her previous position, we have previously decided this exact legal question and the "law of the case" doctrine instructs us to adhere to our prior decision unless we are compelled to change course. *Williamson v. Commonwealth*, 767 S.W.2d 323, 325 (Ky.1989).

After reviewing this case, the ALJ was within his discretion when he found that Conder did not retain the physical capacity to return to the type of work that she performed at the time of her injury. The ALJ relied heavily on the medical

opinion of Dr. Wintermeyer that Conder acquired hypersensitivity pneumonitis due to her workplace exposure to metal working fluids at General Electric. Although General Electric contends that the ALJ ignored Dr. Burki's medical opinion contradicting Dr. Wintermeyer, an "ALJ may pick and choose among conflicting medical opinions and has the sole authority to determine whom to believe." *Copar, Inc. v. Rogers*, 127 S.W.3d 554, 561 (Ky. 2003). Accordingly, the ALJ was free to rely on Dr. Wintermeyer's medical opinion in determining whether Conder retained the physical capacity to return to her prior employment.

General Electric also contends that the ALJ erred by awarding Conder benefits based on one hundred (100%) percent of the state average weekly wage rather than seventy-five (75%) percent of the state average weekly wage. However, after carefully reviewing the record, the ALJ awarded Conder benefits based on seventy-five percent (75%) of the state average weekly wage pursuant to KRS 342.730(1)(b). That is, the ALJ multiplied seventy-five percent of \$550.66 (the state average weekly wage at the time of her occupational disease) by 40.5 percent (her permanent impairment rating), and then multiplied the product by 3 (3-multiplier found in KRS 342.730(1)(c)), which resulted in a weekly benefits award of \$501.81. Therefore, the ALJ's calculation of Conder's weekly benefits award was proper.

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

ALL CONCUR.

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