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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001688-WC

ELKHORN TRUCK PARTS AND SERVICE — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-97415

RANDY BLAKE POTTER;
HON. JOHN W. THACKER, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON AND VANMETER, JUDGES.

DIXON, JUDGE: Elkhorn Truck Parts and Service (Elkhorn) petitions this Court for review of a decision of the Workers' Compensation Board (Board) affirming a

decision of an Administrative Law Judge (ALJ) in favor of Randy Blake Potter (Potter). Finding no error, we affirm.

Potter was born in 1947 and has a high school education with additional vocational training. For the majority of his occupational life, he has worked as a heavy truck mechanic. Since 1975, he has been the co-owner and primary mechanic at Elkhorn Truck Parts and Service in Elkhorn City, Kentucky.

On January 18, 2006, Potter and his business partner, Hoyle Styles, were working underneath a coal truck when the truck's suspension fell across both men. Potter sought medical treatment for a fractured pelvis and a back injury. He returned to light duty work at Elkhorn in May 2006, and began full duty work without restrictions the following month.[1]

In an October 2007, opinion and award, the ALJ assessed a 9% permanent partial impairment for Potter's work injury. The ALJ also found Potter was entitled to an enhanced benefit pursuant to the three multiplier in Kentucky Revised Statutes (KRS) 342.730(1)(c)1. Elkhorn appealed to the Board, arguing the ALJ did not make sufficient findings to support application of the statutory three multiplier. In a February 2008, opinion, the Board vacated the enhanced portion of the ALJ's award and remanded the case for further findings on that issue.

On April 30, 2008, the ALJ issued an order on remand that again awarded Potter enhanced benefits pursuant to KRS 342.730(1)(c)1. Elkhorn

[1] Styles never returned to work at Elkhorn after the accident.

subsequently appealed to the Board, and the Board affirmed the ALJ's award on August 8, 2008. This petition for review followed.

Elkhorn contends the ALJ's interpretation of the evidence was erroneous and substantial evidence does not support application of the three multiplier in KRS 342.730(1)(c)1.

KRS 342.730(1)(c) reads, in relevant part:

> 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
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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. This provision shall not be construed so as to extend the duration of payments.

In *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003), the Kentucky Supreme Court addressed the application of KRS 342.730(1)(c)1 and (c)2. The Court concluded that, in circumstances where both subsections apply, the ALJ has

the authority to choose which benefit is most appropriate under the facts of the case. *Id*. at 12. Specifically, the Court noted, "[i]f 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." *Id*.

Elkhorn contends the evidence does not support the ALJ's finding that Potter cannot return to the type of work he performed before the injury. Elkhorn further argues the evidence does not support a finding that Potter is unlikely to continue earning an equal or greater wage for the indefinite future pursuant to *Fawbush*, *supra*.

Elkhorn's arguments attack the sufficiency of the evidence relied upon by the ALJ. It is well settled the ALJ, "as the finder of fact, and not the reviewing court, has the authority to determine the quality, character and substance of the evidence[.]" *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). Likewise, the ALJ is free "to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof." *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). On appellate review, where, as here, "the decision of the fact-finder favors the person with the burden of proof, his only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to reasonably find as it did." *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

Elkhorn first contends there was no evidence Potter could not return to the type of work he performed at the time of the injury, since he returned to his position as a heavy truck mechanic.

"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." *Ford Motor Co. v. Forman*, 142 S.W.3d 141, 145 (Ky. 2004). The ALJ relied on the medical report of Dr. David Herr, which concluded Potter was incapable of performing his pre-injury work. The ALJ also relied on Potter's own testimony that he could no longer lift heavy truck parts and had hired an assistant to take care of that aspect of his job. The ALJ also noted Potter testified that he finishes tasks more slowly and is only capable of doing 75% of the mechanic work, rather than 90% to 95% of the mechanic work he did prior to the accident. Elkhorn opines that all of the medical experts, aside from Dr. Herr, found Potter able to return to his pre-injury work without restrictions. Although Elkhorn criticizes the evidence relied on by the ALJ, we conclude the ALJ's decision is supported by substantial evidence. The ALJ is free to determine the weight and credibility of the evidence, including the testimony of the claimant. *Caudill*, 560 S.W.2d at 16. After reviewing the record, we find no error on this issue.

Next, Elkhorn contends there was insufficient evidence for the ALJ to conclude Potter was "unlikely to be able to continue earning a wage that equals or

exceeds the wage at the time of injury for the indefinite future[.]" *Fawbush*, 103 S.W.3d at 12.

We are mindful that, "in 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." *Adkins v. Pike County Bd. of Educ.*, 141 S.W.3d 387, 390 (Ky. App. 2004). After reviewing the record, we agree with the Board's conclusion that the ALJ's award was proper. The Board stated, in pertinent part:

> The issue . . . before the Board is whether Potter can continue to earn the same wage earned at the time of the injury into the indefinite future. The parties stipulated at the benefit review conference to an average weekly wage at the time of the injury of $625.00 per week. The parties further stipulated at the benefit review conference Potter earned this wage when he returned to work for Elkhorn. What makes this case unique is the fact Potter was not only a mechanic for Elkhorn, he was the co-owner as well. The other owner of the business was Hoyle Styles who was also injured in the same accident. Potter testified Styles took care of the front end of the business while Potter did the actual repair work. Potter did acknowledge Styles also helped him some with the repair work when he was not working up front.
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> After considering the record, substantial evidence exists to support the ALJ's finding. As pointed out above, Potter lost the help of the co-owner of the business, Styles, who was also injured in the same accident and was unable to return to work. At the time of the first deposition, Potter reported constant low back pain and further stressed he could not sit on the left hip when he tried to work. Since the injury occurred, Potter has been doing about [75%] of the mechanic work as opposed to doing approximately 90% to 95% of the mechanic work prior to being hurt. As a result, Potter has had to hire a helper to do the heavy lifting of the

> springs, rear ends and transmissions. Before the accident, Potter testified he did all the heavy lifting. Potter also reported he is slower in moving as far as getting up and down from under a truck. Potter testified his productivity is down 10% to 15%. He further recounted if he does any heavy lifting, his back and left hip bother him. Potter noted had it not been for the accident, he would be taking in more jobs and doing more work. Potter further testified it takes him 15% to 20% longer to do the job. He further testified the billing was down approximately 15% as compared to before the injury.

We find that, in light of the above-cited evidence and the inferences therein, the ALJ could reasonably conclude Potter is unlikely to earn an equal or greater wage indefinitely. Consequently, the ALJ's award of enhanced benefits under KRS 342.730(1)(c)1 is proper.

For the reasons stated herein, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Carl M. Brashear
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BRIEF FOR APPELLEE:

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