IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

MODIFIED: October 7, 2003
RENDERED: September 18, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 1-22-04 Lisa Gaugh, D.C.

2002-SC-0867-WC

LAUREL COOKIE FACTORY — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2002-CA-0608-WC
WORKERS' COMPENSATION BOARD NO. 00-69127

ANNA FORMAN; HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Although the Court of Appeals and the Workers' Compensation Board (Board) have affirmed the claimant's workers' compensation award, her employer continues to challenge findings that on September 1, 2000, she sustained a work-related injury as evidenced by objective medical findings; that she was entitled to temporary total disability (TTD) benefits until January 4, 2001; and that she had an 8% AMA impairment and a permanent partial disability. Furthermore, the employer maintains that the claimant is not entitled to a double income benefit under KRS 342.730(1)(c)2 because she has not worked since her injury. While we agree that the claimant is not entitled to an enhanced award, we affirm in all other respects.

The claimant alleged that on Friday, September 1, 2000, near the end of her shift, she slipped in some water on the break room floor and fell, landing on her right knee and then her buttocks. She testified that she experienced immediate pain in her

right knee and lower back and that Tammy Jackson, a co-worker, helped her get up. Although she worked on September 4 and 5, she sought medical treatment with Dr. Lester on September 6, 2000, and did not attempt to return to her job or to find other work thereafter. At the hearing, she testified that she continued to see Dr. Hoskins and to experience muscle spasms in her legs, constant headaches, back pain, difficulty sleeping due to pain, and an inability to care for her children due to her symptoms.

Tammy Jackson, a co-worker, testified that she did not see the claimant fall but heard her hand slap the table. When she saw the claimant, she was in a squatting position, tilted backwards. She did not think the claimant's bottom was on the floor and indicated that neither she nor anyone else helped the claimant get up. When she asked the claimant if she was alright, the claimant replied that her knee hurt and kept rubbing her knee which looked red. She also testified that the claimant said that "she had hurt her butt bone in the past and then it was bothering her or something. I'm not for sure."

On re-direct, the claimant insisted that she fell to a sitting position on the floor and that Jackson had helped her to get up. She also testified that her hand did not hit the table as she fell. Finally, she asserted that she was wearing pants with tight legs and could not have pulled up her pant leg to show her knee after the fall.

On September 13, 2000, the claimant gave Dr. Grentz a history of the incident at work and the onset of back pain. On October 25, 2000, she continued to have pain that was made worse by physical therapy. Low back and neck pain continued as of December 4, 2000, at which point Dr. Grentz noted that the claimant would be off work from December 4, 2000, through January 4, 2001. Medical records also indicated that Dr. Grentz had treated the claimant when she was hospitalized in September, 1997, for abdominal pain with frequent vomiting and diarrhea and frequent back pain. Although

they attributed no particular cause to the back pain, they noted a history of previous abdominal surgery and indicated that an ultrasound of the gallbladder was planned.

Dr. Grentz referred the claimant to Dr. Kiefer who saw her on September 27 and October 11, 2000. She gave a history of the fall at work and complained of back pain that radiated into her neck, headaches, bilateral thigh pain, and pain in the right knee. X-rays and a lumbar CT scan revealed a small chip fracture at L4. A bone scan was normal, but an MRI revealed some minimal degenerative changes in the lumbar spine. He concluded that the claimant sustained a diffuse soft tissue strain due to the fall and reached maximum medical improvement (MMI) early in November, 2000, with no permanent impairment. In his opinion, she retained the physical capacity to return to the work she performed at the time of her injury without restrictions.

Dr. Snider examined the claimant in January, 2002, at which time he received a history of the incident at work. She reported low back pain, headache, pain in the right knee, and numbness in the right foot. X-rays that were taken at the time revealed only slight straightening of the cervical curvature, and Dr. Snider reported evidence of symptom magnification. He determined that the claimant's complaints were not related to the incident at work, assigned a 0% impairment rating, and was of the opinion that no work restrictions were warranted.

Dr. Nickerson examined the claimant in March, 2001, at the request of her counsel. She gave a history of the incident at work and of the immediate onset of right foot numbness and low back pain, and she complained of marked pain in several areas, the most severe of which was in the low back. Dr. Nickerson examined her and documented his observations and testing in the report he prepared. He also reviewed the diagnostic studies and medical records from Drs. Lester, Grentz, and Kiefer. After

doing so, he diagnosed lumbosacral musculoskeletal ligamentous sprain/strain, right knee contusion, and chronic pain syndrome, all of which he attributed to the incident at work. Using the Fifth Edition of the AMA Guides, he assigned an 8% impairment under DRE category 2. He based the rating upon the asymmetric loss of motion and nonverifiable radicular complaints, noting that he placed her in the higher end of the category due to the significant impact of her pain on the activities of daily living. In his opinion, the entire impairment was due to the work-related injury and would result in work restrictions. Although listing no specific restrictions, he stated:

> At this time, I am hesitant to place permanent restrictions on this patient as I do not believe that she is able to return to gainful employment. It should also be noted that I do not believe that the patient has reached full maximal medical improvement as I would recommend that she be seen in a chronic pain management clinic to determine if there are other treatment options for her with regard to her pain syndrome. I did go ahead and place a permanent partial impairment as of today's date even though I realize that other treatment options should be considered in this case.

Dr. Hoskins saw the claimant in May, 2001, at which time she gave a history of slipping on a wet floor, twisting her right knee, falling on her buttocks, and jerking her neck and back. At the time, she complained of neck, back, and right leg pain; intermittent numbness in her hands; numbness in the right leg; muscle spasms extending from the neck to the scalp; and frequent headaches. Dr. Hoskins recommended an MRI of the neck and thoracic spine, would refer the claimant for possible EMG studies, and felt that she should continue with Dr. Grentz for pain control.

Persuaded that the claimant did fall at work and that the fall constituted a traumatic event, the ALJ noted that Dr. Hoskins observed a paraspinal muscle spasm, and that Dr. Nickerson had made his diagnosis based upon a physical examination, diagnostic studies, and the claimant's inability to perform toe raises. Although

recognizing that the objective medical findings were minimal, the ALJ was convinced that they were sufficient to prove an injury as defined by KRS 342.0011(1). The ALJ relied upon Dr. Nickerson's testimony with respect to the claimant's AMA impairment rating but was convinced by testimony from the other physicians that the claimant retained the physical capacity to return to her job. The ALJ awarded TTD benefits from September 7, 2000, until January 4, 2001, basing the termination date upon Dr. Grentz's records. For permanent partial disability beginning on January 5, 2001, the ALJ awarded an income benefit under KRS 342.730(1)(b). Furthermore, based upon a finding that the claimant had not returned to work at an average weekly wage that equaled or exceeded her wage at the time of the injury, the ALJ doubled the benefit under KRS 342.730(1)(c)2. After its petition for reconsideration was overruled, the employer appealed.

As the Court of Appeals pointed out, the ALJ is the fact-finder in a workers' compensation proceeding and, in that capacity, has the sole discretion to determine the credibility of witnesses and the quality, character, and substance of evidence. When doing so, the ALJ may reject any testimony and believe or disbelieve any part of the evidence, including testimony from the same witness. KRS 342.285; Whittaker v. Rowland, Ky., 998 S.W.2d 479, 481 (1999). Although the testimony of an interested witness is not binding on the fact-finder, it is of some probative value and may be relied upon if it is found to be credible. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977); Grider Hill Dock v. Sloan, Ky., 448 S.W.2d 373 (1969). Findings that favor the party with the burden of proof may not be reversed on appeal if they are supported by substantial evidence in the record and, therefore, are reasonable. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). Thus, the mere existence of evidence from

which a different finding could have been made, would not compel a different result. Whittaker v. Rowland, supra, at 482.

Contrary to the employer's assertions, we are persuaded that the findings in the claimant's favor were reasonable under the evidence and were properly affirmed on appeal. Although there were discrepancies between the claimant's testimony and that of Tammy Johnson, the fact remains that because the ALJ found the claimant to be credible, her testimony constituted substantial evidence of the traumatic event of September 1, 2000. Likewise, although Dr. Snider was not convinced that the claimant's symptoms were due to the incident at work, records from Drs. Hoskins and Nickerson contained objective medical findings as defined in Staples, Inc. v. Konvelski, Ky., 56 S.W.3d 412 (2001), and those findings supported the conclusion that she suffered a harmful change from the fall at work.

It is undisputed that the extent of a permanent impairment cannot be determined until after an injured worker reaches MMI. Pointing to Dr. Nickerson's belief that the claimant's condition might continue to improve when he assigned an 8% impairment, the employer maintains that the impairment rating is invalid. It does not challenge the method by which the rating was reached but asserts that the rating was premature on the ground that the claimant had not reached MMI. Yet, Dr. Kiefer clearly testified that the claimant reached MMI and retained no permanent impairment as of November, 2000, and it was on that basis that the employer discontinued voluntary TTD benefits. Furthermore, Dr. Snider assigned a 0% impairment in January, 2001, implying a belief that the claimant had reached MMI at that time. Thus, there was substantial evidence from which the ALJ could determine that the claimant reached MMI well before Dr. Nickerson assessed the extent of his impairment in March, 2001.

With regard to the duration of TTD, it is undisputed that Dr. Grentz kept the claimant off work until January 4, 2001. Thus, despite Dr. Kiefer's testimony that the claimant reached MMI in November, 2000, and despite Dr. Nickerson's testimony that the claimant remained unable to work in March, 2001, there was substantial evidence from which the ALJ could reasonably conclude that the claimant was entitled to TTD benefits through January 4, 2001, and to benefits for permanent partial disability thereafter.

Based upon the fact that the claimant had not returned to work at a wage that equaled or exceeded her wage at the time of her injury, the ALJ awarded a double benefit under KRS 342.730(1)(c)2. The employer maintains, however, that because the claimant did not return to work, her employment at a wage that equaled or exceeded her wage at the time of the injury did not cease and, therefore, her award should not have been doubled under KRS 342.730(1)(c)2. We agree.

Since the inception of the Act, income benefits have been awarded on the basis of occupational disability. In Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968), the Court defined occupational disability, taking into account various factors that result in a loss of wage-earning capacity following an injury. That definition was later codified in KRS 342.0011(11), and KRS 342.730(1) authorized income benefits based upon the percentage of occupational disability.

In 1996, KRS 342.0011(11) was amended as part of a major revision of the Act. At the same time, KRS 342.0011(34), (35), and (36) were enacted, and KRS 342.730(1)(b) and (c) were amended. As a result, partial disability was re-defined to require both a permanent disability rating and an ability to work. A table found in

KRS 342.730(1)(b) listed a factor for various ranges of AMA impairment, with the factor increasing as the corresponding range of impairments increased. As set forth in KRS 342.0011(36), the worker's percent of impairment and the corresponding factor were multiplied to arrive at a disability rating from which the income benefit was determined. KRS 342.730(1)(c)1 provided for a 50% increase in the benefit of an individual who did not retain the physical capacity to return to the previous type of work, and KRS 342.730(1)(c)2 provided for a 50% reduction in the benefit of a worker who returned to work at a wage that equaled or exceeded the wage when injured. Thus, the benefit of an individual who retained the physical capacity to return to the previous type of work but failed to do so was calculated under KRS 342.730(1)(b) and was neither enhanced nor reduced.

Effective July 14, 2000, the method for awarding permanent partial disability benefits was amended again. The factors contained in KRS 342.730(1)(b) were decreased. KRS 342.730(1)(c)1 was amended to provide for a triple benefit if the worker did not retain the physical capacity to return to the previous work, with KRS 342.730(1)(c)3 providing additional multipliers based upon age and education. KRS 342.730(1)(c)2 was amended to provide:

> 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.

The question presented by this appeal is how the legislature intended for permanent partial disability benefits to be calculated when a worker retains the physical capacity to return to their previous work but fails to do so.

As under the 1996 amendments, KRS 342.730(1)(b) and (c) provide a system for calculating partial disability benefits. KRS 342.730(1)(b) continues to provide for a basic partial disability benefit, but because the factors are smaller than under the 1996 Act, the benefit is smaller. Under KRS 342.730(1)(c)1 and 3, an individual who does not retain the physical capacity to return to the previous type of work receives triple the basic benefit and may be entitled to additional multipliers based upon age and education. Whereas, under KRS 342.730(1)(c)2, an individual who returns to work earning the same or greater wage receives the basic benefit but is entitled to a double benefit for any period that the employment ceases, regardless of the reason.

When determining that KRS 342.730(1)(c)2 authorized a double benefit on these facts, the decisions below failed to address the implications of the finding that the claimant retained the physical capacity to return to her previous work and the fact that she failed to attempt any type of work after her injury. As stated in KRS 342.710(1), one of the primary goals of Chapter 342 is to encourage injured workers to return to work, preferably with the same employer and to the same or similar work. In the past, a means for doing so was to limit income benefits for partial disability to two-thirds of the worker's average weekly wage, up to a maximum of 75% of the state's average weekly wage, so that it was less profitable to be disabled than to be employed. Although the 1996 and 2000 versions of KRS 342.730(1)(b) and (c) retain the same maximums, they also provide a financial incentive for partially disabled workers who retain the physical capacity to return to the type of work they performed until the injury to do so. Consistent

with the policy of awarding benefits in proportion to occupational disability, they provide the greatest benefits to those workers who do not retain the physical capacity to do so, for those are the workers who would be expected to suffer the greatest wage loss due to their injuries.

The 1996 version of KRS 342.730(1)(b) and (c) provided a basic benefit for those who retained the physical capacity to return to the previous type of work and provided and enhanced benefit to those who lacked the physical capacity to return to their previous work. Furthermore, because individuals who returned to work at the same or greater wage were permitted to receive a partial income benefit in addition to their post-injury earnings, the statute provided a financial incentive for workers who retained the physical capacity to return to their previous work to do so. The apparent goal of the 2000 amendments was to provide an even greater incentive for that group of workers to return to their previous type of work and, presumably, to earn the same or a greater wage than when injured. Thus, those who fail to do so are limited to the basic benefit under KRS 342.730(1)(b), with the benefit based upon a lower statutory factor than under the 1996 Act. In contrast, those who return to work at the same or a greater wage are permitted to receive the basic income benefit in addition to their earnings. Furthermore, they are assured a double benefit during periods that the employment is not sustained, regardless of the reason. Thus, workers who retain the physical capacity to perform their previous work are rewarded for attempting to do so even if the attempt later proves to be unsuccessful.

After reviewing the lay and medical evidence, the ALJ determined that the claimant retained the physical capacity to return to her previous work. Whereas, the claimant maintained she was unable to work and made no attempt to do so. Under

those circumstances, she was entitled to receive only the basic income benefit that is provided in KRS 342.730(1)(b).

The decision of the Court of Appeals is affirmed in part and reversed in part, and the claim is remanded to the ALJ for the entry of an award of income benefits under KRS 342.730(1)(b).

Lambert, C.J., and Graves, Johnstone, Keller, Stumbo, and Wintersheimer, JJ., concur. Cooper, J., disagrees with the construction of KRS 342.730(1)(c) as per his dissenting opinion in Fawbush v. Gwinn, Ky., 103 S.W.3d 5, 13 (2003), and, therefore, concurs in result only.

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ORDER MODIFYING OPINION ON THE COURT'S OWN MOTION

On the Court's own motion, the Opinion of the Court rendered on September 18, 2003, is modified by the substitution of a new page nine and new page ten, hereto attached, in lieu of pages nine and ten of the Opinion as originally rendered. Said modification does not affect the holding of the Opinion, but is made only to correct typographical errors on pages nine and ten (page nine: "triple" to "double"; page ten: omit the word "twice").

ENTERED: October 7, 2003.

CHIEF JUSTICE