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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: August 25, 2005
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

DATE 9-15-05 Entered D.C.

2004-SC-0784-WC

ALLWOOD MANUFACTURING, INC. — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2003-CA-2144-WC
WORKERS' COMPENSATION BOARD NO. 00-76636

RICKEY CLARK; HON. W. BRUCE COWDEN, JR., ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In a decision that the Workers' Compensation Board (Board) and the Court of Appeals have affirmed, an Administrative Law Judge (ALJ) based the claimant's average weekly wage on his earnings from both the defendant-employer and a concurrent employer. Appealing, the defendant-employer asserts that the Court of Appeals misconstrued KRS 342.140(5) and also that the record did not contain substantial evidence to support the finding of concurrent employment. We affirm.

The claimant was unemployed for a number of years due to a work-related low back injury. In January, 2000, he began to work full-time for Allwood Manufacturing, Inc., as a material handler. In April, 2000, he also began to work part-time at a convenience store that was owned by Duke & Long Distributing Company. Shortly thereafter, the claimant injured his neck and shoulder while working for Allwood. He later testified that he thought the injury occurred on April 15, 2000; however, Allwood

reported to its insurance carrier that it occurred on May 15, 2000. Despite multiple surgeries, the claimant was unable to work and sought benefits for total disability. The ALJ determined that the injury had rendered him totally disabled but that half of his disability was pre-existing, active and, therefore, non-compensable.

Among the contested issues was the manner for determining the claimant's average weekly wage. The claimant asserted that he was entitled to have his income benefit based on the combined wages from his two employments. Allwood maintained that it was unaware the claimant was a paid employee of Duke & Long and, therefore, that the statute was inapplicable.

At his discovery deposition, the claimant testified as follows:

Q. Did Bob Futrell know about your job at Duke & Long?

A. Yes, sir.

Q. And why do you say that?

A. Because I worked on the weekends at my other job.

Q. You worked on the weekends at Metropolis Truck and Travel?

Q. Did you tell anyone at Allwood you were being paid for that work?

A. Yes, sir, they knew I was working there.

Q. Did they know that you were being paid for that work?

A. I don't know if they did or not.

Q. Do you remember advising someone at Allwood that you were just trying to help out your girlfriend?

A. When I first went over there, I was.

Q. Did you ever tell anyone at Allwood that it changed, and you were earning money while working at Duke & Long?

A. When I first started? Say that again?

Q. You just indicated, if I understand you correctly, that your initial intent was to go to Metropolis Truck and Travel to help out?

A. Uh-huh (affirmative response)

Q. Is that fair?

A. Yes, sir.

Q. And then later on, it was decided that you would start to make an hourly rate of pay?

A. Hourly wages, yes, sir.

Q. How long was it into your work at Metropolis Truck and Travel that it was decided you would receive pay, instead of just help out?

A. It was probably a week and half something like that, two weeks.

Q. Did you ever tell Bob Futrell that you were working for pay at Duke & Long, or Metropolis Truck and Travel?

A. Yes, sir, I believe I did.

Q. When did you tell him that?

A. I don't remember the exact date, but there was something said about working overtime on the weekends after I took that for extra money, and I told him that I could not do it, I wasn't going to give it up.

Q. You weren't going to give up your wage at Metropolis Truck and Travel?

A. Yes, sir.

Q. We're here about an accident that you had at Allwood, or one that you describe in your application; did you tell Mr. Futrell before that accident that you were working for pay at Metropolis Truck and Travel?

A. Yes, sir, as far as I know I did.

Questioned on the matter again, at the hearing, he testified:

Q. So when did you start working for wages for Duke & Long?

A. Somewhere along the 14 or 15th, somewhere along in there.

Q. At about the same time you think you had your accident at Allwood?

A. Yes, sir, that's what I'm saying.

Q. And if I recall your prior testimony correctly, you are not sure whether or not anyone at Allwood knew you were working for wages at Duke & Long?

A. I think I told them I was, I know I told them I had started work because they wanted me to work on the weekends, and I told them that since I had started over there, and they hadn't been wanting any overtime before, that I was going to keep the weekend job over there.

Allwood's co-owner and manager, Robert Futrell, testified on the company's behalf as follows:

Q. You heard Mr. Clark testify to a job he had through Duke & Long at Metropolis Truck Stop, I believe it is?

A. Yes, sir.

Q. When Mr. Clark was working for you, were you aware he was employed by Duke & Long at this truck stop in Metropolis?

A. I was aware that he was there but he stated to me that he went over and helped his girlfriend out. I was made aware that he actually drew a wage when I received this in the mail from your office. That's the first time I knew he actually drew wages.

Q. And by this, are you talking about what has been made an exhibit?

A. The payroll statement there, yes sir, the payroll statement. I don't know he actually drew wages, but I knew he would go over there, and I think his words were "I helped her out over there."

Q. So when did you first learn Mr. Clark was an employee of Duke & Long?

A. Actually as a paid employee, when I received that.

Q. Was that after his claim was filed?

A. Yes, I believe it was a few months ago, about two months ago, whenever I received that . . . it was before the deposition that we had in your office.

Resolving the issue in the claimant's favor, the ALJ stated as follows:

> 22. From the facts and evidence, the [ALJ] must find that the statute does apply so as to require concurrent employment. The [ALJ] points out that on page 23 of the formal hearing transcript, the Plaintiff testified that he thought that he had told his supervisors with Allwood Manufacturing Company that he was working at another job because they wanted him to work weekends and he told them that since starting with this other job, he was going to keep the weekend job that he had with Duke & Long. The Plaintiff further testified in his discovery deposition on page 31 that he had started working as a cashier just before the injury at Allwood occurred. He further testified that he was working 48 hours every two weeks as a part-time employee working as a janitor and a cashier and earning between $5.50 or [sic] $6.00 per hour. The wage records reflect that the Plaintiff's rate per hour was $6.00 per hour, however. Furthermore, the [ALJ] cites to the testimony of Robert Futrell, who testified at the formal hearing that he knew that the Plaintiff was working for Duke & Long at a convenient truck stop at the same time he was working for his company. For these reasons, the [ALJ] finds that concurrent employment applies. The [ALJ] calculates the Plaintiff's wage with Duke & Long at $135.00 per week and his wage for the Defendant/Employer to be $247.89 per week, for a total wage rate of $382.89 per week.

Allwood maintains that, in affirming the Board's decision, the Court of Appeals misconstrued KRS 342.140(5), which provides:

> When the employee is working under concurrent contracts with two (2) or more employers and the defendant employer has knowledge of the employment prior to the injury, his wages from all the employers shall be considered as if earned from the employer liable for compensation.

Allwood argues that the statute requires two findings: 1.) that the injured employee was working under concurrent contracts with two or more employers; and 2.) that the

defendant-employer had knowledge of the concurrent employment prior to the compensable injury. Pointing to the finding that Futrell knew of the claimant's work at the truck stop before he was injured, Allwood asserts that Futrell's actual testimony was the opposite. It argues that knowledge the claimant went to the truck stop to help his girlfriend does not constitute knowledge of the type required by KRS 342.140(5) and that the record contains no substantial evidence to support a finding of concurrent employment.

Contrary to the employer's assertion, we are not persuaded that the Board and the Court of Appeals "misconstrued the statute in finding the appellant employer had knowledge of other 'work' performed by Mr. Clark as of the date of injury in question." Like the employer, they construed the statute as requiring both concurrent employment and the employer's knowledge of that employment as of the date of injury. They were simply not convinced that the ALJ was required to rely upon Futrell's testimony regarding what he knew and when; nor are we.

KRS 342.285 provides that an ALJ's decision is "conclusive and binding as to all questions of fact" and that the Board "shall not substitute its judgment for that of the [ALJ] as to the weight of evidence on questions of fact." KRS 342.290 limits the scope of review by the Court of Appeals to that of the Board and also to errors of law arising before the Board. The courts have construed KRS 342.285 to mean that the fact-finder, rather than the reviewing court, has the sole discretion to determine the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). As fact-finder, an ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes 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). Where the party with the burden of proof is successful before the ALJ, the issue on appeal is whether substantial evidence supported the ALJ's conclusion, in other words, whether the conclusion was reasonable. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986); Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). Although a party may note evidence that would have supported a contrary conclusion, such evidence is not an adequate basis for reversal on appeal. Special Fund v. Francis, supra; McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

Contrary to the employer's assertion that the ALJ was required to rely on Futrell's testimony concerning Allwood's knowledge, even the uncontradicted testimony of an interested witness will not compel a particular result. Grider Hill Dock v. Sloan, 448 S.W.2d 373 (Ky. 1969). The knowledge of an individual at a given point in time is a fact that may be inferred from the available evidence. The claimant and Futrell gave conflicting testimony regarding what Allwood knew and when. Although the claimant stated at one point that he "thought" he informed Futrell, his testimony as a whole was not as speculative as that isolated statement might imply or so speculative that it must be viewed as being unreliable. Futrell stated that he understood the claimant's statements to him to mean that he was merely "helping out" his girlfriend, but the words "helping out" do not foreclose a reasonable inference that the helper is being paid to do so.

It is apparent that the evidence regarding Allwood's knowledge of the concurrent employment was conflicting and that the weight of the evidence did not compel a finding in either party's favor. Nonetheless, there was sufficient evidence to support a reasonable inference that Allwood knew of the concurrent employment before the date

of the injury. Under the circumstances, we find no error in the finding that was made or in the decisions to affirm it.

The decision of the Court of Appeals is affirmed.

All concur.

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