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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: APRIL 20, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 5-11-06 Ellis County, DC.

2005-SC-0575-WC

TRI COUNTY OPERATIONS — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-0017-WC
WORKERS' COMPENSATION BOARD NO. 01-74075

CURTIS SURGENER; HON. R. SCOTT BORDERS, ADMINISTATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In a decision that was affirmed by the Workers' Compensation Board (Board) and the Court of Appeals, an Administrative Law Judge (ALJ) enhanced the claimant's income benefit under KRS 342.730(1)(c)1. Appealing, the employer asserts that the finding supporting the enhancement was unreasonable under the evidence and that the decision in Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), should be revisited and overruled. We affirm.

The claimant was born in 1964, completed 11 years of school, and earned a GED. He performed odd jobs doing farm work during his late teens and early 20's, after which he worked for a year as a gas station cashier. He also received vocational training as a welder and worked in that field for about five years. Most of his work life was spent performing machine maintenance in manufacturing facilities. In 1996, he

injured his lower back while crawling through an oven at a commercial bakery, performing maintenance. A May 14, 1996, report indicated that after a course of physical therapy, Dr. Brooks permitted him to return to work "without restriction, limitation, or impairment" but urged him to lose weight.

The present claim arose on June 12, 2001, when the claimant injured his lower back working in the defendant-employer's rebuild shop. When deposed by the employer, he testified that he was on his knees, bending over, and pulling a 20-foot piece of steel that weighed 150-175 pounds out of a rack. While doing so, he felt a burning pain at his belt line that radiated into his leg and informed his supervisor. He continued working and did not seek medical attention for a few months, hoping that the pain would go away. He went to Jellico Occupational Health eventually and received physical therapy and medication. A lumbar MRI revealed abnormalities, so he was referred to Dr. Brooks who performed surgery in January, 2002. After physical therapy and four months off work, the claimant returned to part-time work and eventually to work without restrictions. He received a raise upon his return.

The claimant testified that before the injury he worked in the rebuild shop, rebuilding parts, machinery, fabrication tables, or whatever else needed to be repaired or built. His post-injury work as a machine attendant required him to monitor one machine and perform repairs as necessary. Asked if the work was similar to what he did before the injury except that before the injury "you would fix and work on a large assortment of things and now you fix and work on one machine," he responded, "Yes." He was not asked to compare the physical requirements of the jobs.

In July, 2003, the claimant returned to Dr. Brooks complaining that his symptoms had worsened and that he had difficulty working. He filed an application for benefits in

December, 2003. His evidence consisted of medical reports from Dr. Brooks, his treating physician, and reports of the evaluations that his attorney requested from Drs. Forberg and Johnson. The employer's evidence consisted of the claimant's February 27, 2004, deposition and its subsequent deposition of Dr. Brooks. The parties submitted the case on the record without a hearing.

Dr. Brooks' records indicate that he saw the claimant on November 27, 2001, for complaints of severe back pain that radiated into the right leg. He diagnosed a herniated disc at L5-S1 for which he performed surgery on January 16, 2002. Reports from February 26 and May 13, 2002, indicated among other things that he was urging the claimant to try to lose weight. On May 20, 2002, Dr. Brooks permitted the claimant to return to work for four hours per day with restrictions on pulling, twisting, and lifting. He increased the limitation to six hours on June 3, 2002. On July 15, 2002, he assigned a 15% impairment under DRE category II-III and released the claimant from his care. The claimant returned approximately a year later, on July 8, 2003, complaining that symptoms in his back and right leg had worsened and that "he was having a difficult time with his work." At that time, Dr. Brooks recommended updated diagnostic testing and a re-evaluation.

When deposed by the employer, Dr. Brooks testified that the surgical findings were consistent with a herniated disc that compressed the S1 nerve root. The claimant's recovery was good, and he was released to full duty, without restrictions, on July 15, 2002. When the claimant returned in July, 2003, complaining of difficulties, Dr. Brooks prescribed pain medication and ordered diagnostic testing. He had not seen the claimant since then and had not prescribed any pain medication he might currently be taking. Although he thought that the claimant would require further medical

treatment, it would not necessarily involve surgery. Dr. Brooks would advise the claimant to avoid repetitive bending, stooping, climbing, crawling, and squatting. He would limit sitting and standing and would limit lifting to 35 pounds. Questioned about the 15% impairment rating, he explained that the claimant fell between DRE categories II and III. He then revised the impairment to 13%, the maximum permitted for category II. Asked if the claimant should continue trying to lose weight to help his back condition, assuming that he continued to weigh 300 pounds or more, Dr. Brooks responded in the affirmative.

Dr. Forberg evaluated the claimant on November 14, 2003. He took a history of the work-related injury and subsequent treatment, noting that the claimant's back pain had returned in July, 2003. The claimant complained of a constant, dull, low back ache on the right side. He reported that it eased when sitting and resting but that it worsened with standing and bending. Dr. Forberg noted that the claimant presently took Ibuprofen and Lorcet Plus for pain. He diagnosed a surgically-treated disc herniation at L5-S1 and post-surgical pain syndrome, noting that it was common to see a recurrent, chronic low back condition after such surgery. He assigned an 18% impairment under DRE category III-IV and indicated that the claimant lacked the physical capacity to return to the type of work he performed at the time of the injury. Dr. Forberg stated that he would restrict the claimant from lifting more than 20 pounds, from prolonged standing or sitting, and from bending, stooping, or twisting.

Dr. Johnson evaluated the claimant on February 20, 2004. The claimant gave a history of the work-related injury and treatment. He reported that he took Flexeril off and on, Soma as needed, and Lortab off and on; that he was able to perform his present job "by a hair;" that he called in sick when his back was particularly

symptomatic; and that he wished to undergo the additional diagnostic studies that Dr. Brooks had recommended in July, 2003, but the employer's insurance company would not approve them. Dr. Johnson examined the claimant, noting that he was 5'5" tall and weighed 330 pounds, which was 30 pounds more than his usual weight. Dr. Johnson diagnosed a surgically-treated herniated disc and a subsequent aggravation or exacerbation of the condition with recurrent low back pain that radiated into the right leg. Physical findings confirmed the existence of S1 radiculopathy. Dr. Johnson assigned a 14% impairment and restricted the claimant from repeatedly lifting more than 40 pounds, from repeatedly carrying more than 20 pounds, and from repeatedly bending, twisting, or pulling. He would advise the claimant to avoid climbing and to limit walking, standing, and sitting to his capability. Noting that the claimant had returned to the type of work he performed at the time of the injury, Dr. Johnson indicated he retained the physical capacity to do so. Noting also that the claimant's back and leg pain returned in July, 2003, shortly after his return to work, Dr. Johnson thought that updated diagnostic studies were warranted.

On February 9, 2004, the employer filed a wage certification, establishing that the claimant's average weekly wage was $549.00 per week, and also filed a job description. The latter document bore the claimant's name but did not indicate whether it pertained to his pre- or post-injury duties. It did indicate that he was required to lift 0-10 pounds and 10-20 pounds, each for 1-2 hours per day; to stand for 6-8 hours per day; and to climb, kneel, bend, and reach, each for 1-2 hours per day.

The ALJ determined that the claimant was partially disabled and relied upon the 13% impairment that Dr. Brooks assigned at his deposition. Convinced that the claimant had met his burden under KRS 342.730(1)(c)1, the ALJ stated:

> The [ALJ] specifically finds that while the Plaintiff is earning an equal or greater wage while operating the machine for the Defendant/Employer, it is highly unlikely he is going to be able to continue this into the indefinite future due to his continued complaints of pain and the fact that he is having to take Ibuprofen and Lorcet Plus on a daily basis in order to perform his job.
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> Plaintiff's job at the time of the injury consisted of being a rebuilt shop person and fabricator[;] this required him to rebuild parts, machinery, fabrication tables, or whatever needed to be fixed.
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> At the time of his injury, he was required to lift up to 150-170 pounds. The job he is doing now requires him to sit and watch a machine run and if something happens, he will have to fix that one machine.
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> The [ALJ] is persuaded that the Plaintiff's testimony that he does not retain the physical capacity to return to the type of job that he was performing at the time of the injury, and is further persuaded that the Plaintiff will not be able to continue earning the wage that equals or exceeds the wage at the time of the injury into the indefinite future.

The employer's petition for reconsideration took issue with the finding that the claimant was unlikely to be able to continue earning the same or greater wage indefinitely. It maintained that Fawbush, supra, was factually distinguishable and requested specific findings regarding the decision to award benefits under KRS 342.730(1)(c)1. The petition was denied as being a re-argument of the merits, after which the employer appealed. Although acknowledging that "the quantity and quality of the evidence makes this a decidedly close call" and that a different fact-finder might have reached a different conclusion, the Board refrained from substituting its judgment for that of the ALJ and affirmed. Likewise, the Court of Appeals affirmed.

As amended effective July 14, 2000, KRS 342.730(1)(c) provides, in pertinent part, as follows:

> 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.
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> 4. Notwithstanding the provisions of KRS 342.125, a claim may be reopened at any time during the period of permanent partial disability in order to conform the award payments with the requirements of subparagraph 2. of this paragraph.

As enacted in 1996, KRS 730(1)(c)1 and 2 were separated by the word "and." As a consequence, the Board applied them concurrently when a claim met the criteria for both. Fawbush, 103 S.W.3d at 12. As amended in 2000, KRS 342.730(1)(c)1 and 2 are separated by the word "or," implying a legislative intent for only one provision to be applied to a particular claim. Although a worker may meet the criteria of both subsections simultaneously, the statute does not express a preference for applying one subsection over the other. KRS 342.730(1)(c)4 permits a worker who ceases to earn the same or greater wage to reopen at any time in order to receive a double benefit. It does not permit a worker who meets the criteria of both KRS 342.730(1)(c)1 and 2 at the time of the initial decision to receive a triple benefit at reopening based on an inability to continue to earn the same or greater wage.

The Fawbush court determined that if an individual meets the criteria of both

KRS 342.730(c)(1)1 and 2, an ALJ is free to choose which subsection is more appropriate under the facts. See also, Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 211 (Ky. 2003). Depending on the available evidence, the likelihood of being able to continue performing the post-injury job may be one of several factors indicating that the worker probably will or will not be able to continue earning the same or greater wage into the indefinite future. See Adkins v. Pike County Board of Education, 141 S.W.3d 387, 390 (Ky. App. 2004). Although the employer urges the court to reconsider, the arguments it raises presently were considered by the Fawbush court and rejected. The decision was rendered in 2003, and the statute has not been amended since then; therefore, we infer that the legislature assents.

In Fawbush, supra, it was undisputed that the worker lacked the physical capacity to return to work as a framing carpenter and that his permanent disability was only partial. He testified that after temporary total disability benefits ceased he relied on the generosity of friends. Eventually, another employer gave him work at a greater wage, as a construction supervisor. Although the work was less strenuous than framing carpentry, it was outside his medical restrictions and required him to take more than the prescribed amount of narcotic pain medication. He testified that he did the work out of necessity because he had no other income. Faced with a claim in which the evidence supported applying both KRS 342.730(1)(c)1 and 2, the ALJ determined that the worker's physical impairment permanently altered his ability to earn an income and awarded benefits under KRS 342.730(1)(c)1. Noting that it was unlikely he would be able to continue earning the same or greater wage for the indefinite future, the court determined that the evidence supported the decision to apply KRS 342.730(1)(c)1.

In the present case, the ALJ determined that the claimant lacked the physical

capacity to return to the type of work he performed at the time of his injury; however, although his present wage was more than what he earned when he was injured, he would not be able to continue earning such a wage indefinitely. The employer maintains that there was no substantial evidence to support the conclusion. It emphasizes that the claimant had worked as a machine attendant for almost two years when he was deposed, and he did not testify regarding his present symptoms or the effect of his back condition on his ability to continue performing the job. Statements from Dr. Johnson's report indicating that the claimant experienced increased symptoms of pain and was able to hold on to his present job "by a hair" were taken from the patient history, did not explain why, and did not represent a medical opinion. Likewise, although Dr. Forberg's report indicated that the claimant complained of a constant dull ache and took Ibuprofen and Lorcet Plus at that time, it did not reveal who prescribed them or indicate that he took them daily.

KRS 342.285 designates the ALJ as the finder of fact in workers' compensation claims. As such, the ALJ is free to judge the weight and credibility of evidence and to draw reasonable inferences from it. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). When more than one reasonable inference may be drawn from the evidence, the ALJ may choose what to infer. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Blair Fork Coal Co. v. Blankenship, 416 S.W.2d 716, 718 (Ky. 1967). The decision to apply KRS 342.730(1)(c)1 favored the claimant; therefore, our standard for review is whether 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).

It is clear that the claimant's physical restrictions would not permit him to engage

in the type of work he performed at the time of his injury, and it also clear that he earned more when his claim was considered than he had when he was injured. What is truly at issue is whether it was reasonable to conclude that the effects of the injury were likely to prevent him from doing so indefinitely. Contrary to the employer's assertion, this is not a case in which the ALJ failed to set forth sufficient facts to support the ultimate legal conclusion. See Shields v. Pittsburgh and Midway Coal Min. Co., 634 S.W.2d 440 (Ky. App. 1982). The opinion was 17 pages long and included a recitation of the lay and medical evidence as well as a legal analysis. Moreover, the record contained sufficient evidence to support the ultimate conclusion. See Louisville Cooperage v. Knoppe, 695 S.W.2d 440, 441 (Ky. App. 1985); Stovall v. Collett, 671 S.W.2d 256 (Ky. App. 1984).

In July, 2003, about a year after his return to lighter work, the claimant sought treatment with Dr. Brooks for recurrent back and leg pain. He also complained that he was experiencing difficulty working. Dr. Brooks recommended further diagnostic testing, which was not performed. Although the ALJ's recitation of the evidence included statements that the claimant made to Drs. Brooks, Forberg, and Johnson, the employer has pointed to nothing in the analysis that indicates an improper reliance on any statement. The evidence in this case clearly did not rise to the level of that in Fawbush, supra, and would not have compelled a decision in the claimant's favor had one not been made. Nonetheless, it was sufficient to permit a reasonable inference that he would probably not be able to continue earning the same or greater wage indefinitely. The Board and the Court of Appeals did not err in affirming.

The decision of the Court of Appeals is affirmed.

Lambert, C.J. and Graves, Johnstone, Scott and Wintersheimer concur. Cooper and Roach, JJ., dissent for the reasons set forth in Justice Cooper's dissenting opinion in Fawbush v. Gwinn, 103 S.W.3d 5, 13 (Ky. 2003).

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