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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: OCTOBER 19, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 11-9-06 ELA GRAUHT P.C.

2006-SC-0090-WC

R & S BODY COMPANY, INC. — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-0800-WC
WORKERS' COMPENSATION NO. 02-02148

JOHN T. McCOY;
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) enhanced the claimant's income benefit under KRS 342.730(1)(c)1 after finding that although he continued to perform the heavy manual labor that he performed at the time of injury, he did so in excess of his medical restrictions, in pain, and would not be able to do so for the indefinite future. The Workers' Compensation Board and the Court of Appeals affirmed. Appealing, the employer asserts that the evidence did not support the award and that this court should revisit its decision in Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). We affirm.

The claimant was born in 1955. He completed the 10th grade and earned a GED but had no specialized or vocational training. His entire work experience was as a welder. In 1985, he began working for the defendant-employer welding large trucks.

He described the work as being heavy and stated that it was demanding because he had a daily production quota. In the 1990's he began to experience neck and upper back pain. Sometime in 2000, he was told that he had a bulging disk in his neck and was restricted to lifting less than 35 pounds. His family physician, Dr. Verma, treated him and prescribed medication for the condition. His application for benefits alleged three subsequent work-related injuries.

On April 18, 2001, the claimant fell from a ladder while welding and experienced low back pain. On January 14, 2002, he fell from a height of about three feet and landed on his hips and low back. Although he experienced pain in the same area of his back as before, it was much more severe. Finally, on May 17, 2002, he fell from the back of a truck and landed on his back on the concrete floor.

The claimant testified that he continued to work after each accident despite his physicians' advice because he could not afford to do otherwise financially. He was laid off for the five-month period before January 27, 2003, but returned to his job thereafter. He acknowledged that he complained of mild low back pain to his physicians over the years but stated that his severe problems did not begin until after the second work-related accident. He stated that he now had back pain and pain and numbness in the left leg; difficulty getting up and down; and difficulty with prolonged sitting. He could no longer weld tailgates because they exceeded his 25-pound weight restriction. Since the last injury, he found it difficult to weld beneath tailgates and could not work as much overtime as previously. Although he acknowledged that his neck condition caused some difficulty working, he stated that his low back condition caused the more severe pain. The claimant testified that he had rarely missed work throughout his career and that he wanted to continue working as long as possible.

Records from the Mountain View Family Health Center indicated that the claimant was seen on January 14, 2000, for complaints of neck and low back pain. He was also seen on October 4, 2000, for complaints in the right upper back after a fall.

Records and a Form 107 from Dr. Iyer, a pain management specialist, trace a course of treatment that began with a referral from Dr. Verma for complaints of neck, right shoulder, and lower back pain. On February 14, 2002, Dr. Iyer noted an impression of a disc bulge at C5-6 and right upper extremity radiculitis, which he treated with a series of trigger-point and epidural injections. On May 16, 2002, the claimant reported that since a fall at work about two months earlier he had experienced a worsening of his chronic low back pain, an inability to rise from a supine position or extend backwards, and shooting pain down both legs. A subsequent MRI revealed a herniated disc at L5-S1. Lumbar epidural injections were unsuccessful at relieving the low back and bilateral radicular pain, but the claimant was reluctant to consider surgery. In November, 2002, Dr. Iyer reported that the claimant's work-related accidents caused his complaints. Although he deferred to Dr. Templin regarding impairment and restrictions, he was of the opinion that the claimant did not retain the physical capacity to perform the type of work he was performing at the time of the injuries. Dr. Iyer noted that the claimant was a skilled laborer and worked as a welder.

Dr. Templin took a history and examined the claimant on November 4, 2002, completed a Form 107, and was deposed. He noted complaints of low back pain that radiated bilaterally into the hips and legs and neck pain that radiated bilaterally into the arms and shoulders. He diagnosed chronic low back pain syndrome and a lumbar disc bulge, among other things, and he related the conditions to the injuries sustained on January 14 and May 17, 2002. Dr. Templin assigned an 8% impairment. Although he

did not assign permanent restrictions, he recommended that the claimant avoid or minimize extensive or repetitive bending, stooping, kneeling, crouching, lifting, carrying, or climbing. He should also avoid riding in vibratory vehicles, using foot controls repetitively, lifting or carrying more than 20 pounds from waist level or more than 10 pounds from floor level, and from repetitive lifting from floor level. Dr. Templin stated that should the claimant disregard those restrictions, his pain would increase and ultimately prevent him from working.

In November, 2003, Dr. Jenkinson performed an IME for the employer. He stated that a January 19, 2002, MRI of the cervical spine revealed kyphosis and a mild bulge at C5-6. The May 25, 2002, lumbar MRI revealed multiple bulging discs, dessication and a central herniation at L5-S1, but no evidence of spinal stenosis. He found no evidence of a neurological abnormality in the back or neck, no clinical signs of an acute lumbar disc herniation, and he attributed the lumbar MRI findings to degenerative disease rather than an acute injury. In his opinion, the work-related injuries were minor and caused only a temporary exacerbation of the degenerative condition but no permanent impairment and no need for work restrictions or future medical treatment.

Dr. Olash performed a utilization review for the employer in March, 2004. He noted that the claimant failed to seek medical treatment until a month after the January, 2002, injury and then complained of cervical rather than lumbar pain. He made no specific lower back complaints until May, 2002. Dr. Olash found no conclusive evidence or findings to strongly relate the current back complaints to the January 14, 2002, injury.

The ALJ determined that the April 18, 2001, incident was not an injury, noting the

absence of any objective medical findings that it caused more than some minor back pain, which would be expected after a fall from a ladder. Relying on evidence from Drs. Verma, Iyer and Templin, the ALJ noted that the claimant first experienced severe back pain after January 14, 2002, but before May 17, 2002. Observing that the claimant's "solid work ethic" and determination to work made his allegations much more difficult, the ALJ found that the January 14, 2002, incident was an injury and resulted in an 8% impairment, none of which was pre-existing. Noting that the claimant was already under treatment for severe back pain in May, 2002, the ALJ concluded that the third incident exacerbated the previous injury but did not cause a new injury. Under KRS 342.730(1)(b), the 8% impairment yielded a 6.8% disability rating.

Turning to KRS 342.730(1)(c)1 and 2, the ALJ noted that Dr. Templin thought the claimant lacked the physical capacity to return to the work he performed at the time of injury. He also imposed work restrictions that would preclude the heavy, demanding work the claimant described. The ALJ noted that despite pain and numbness in his left leg, difficulty performing some of his work, an inability to weld tailgates, and an inability to work as much overtime, the claimant continued to perform heavy manual labor that clearly exceeded his restrictions and caused him to suffer "on a daily basis." Convinced that he would be unable to continue the work indefinitely and noting his "restrictions against doing much of the work he has done in the past," the ALJ found KRS 342.730(1)(c)1 to be more appropriate.

The employer's petition for reconsideration objected to the finding that the claimant was unlikely to be able to continue earning the same or a greater wage indefinitely. It maintained that Fawbush v. Gwinn, supra, was factually distinguishable and requested specific findings regarding the decision to award benefits under KRS

342.730(1)(c)1. The ALJ denied it, and the employer appealed.

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.

The court reasoned in Fawbush v. Gwinn, supra, that when enacted in 1996, KRS 342.730(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. As amended in 2000, KRS 342.730(1)(c)1 and 2 are separated by the word "or," implying a legislative intent that only one provision be applied. The court observed that although a worker may meet the criteria of both subsections simultaneously, the legislature's choice of the

word "or" to separate subsections 1 and 2, rather than a word such as "however," implies no preference for applying one subsection over the other. The court also observed that KRS 342.730(1)(c)4 permits a worker who ceases to earn the same or a greater wage to reopen at any time in order to receive a double benefit. However, 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 a greater wage.

In Fawbush v. Gwinn, supra, and subsequently in Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 211 (Ky. 2003), the court determined that if an individual meets the criteria of both KRS 342.730(1)(c)1 and 2, an ALJ is free to apply the subsection that is more appropriate under the facts. In Adkins v. Pike County Board of Education, 141 S.W.3d 387, 390 (Ky. App. 2004), the court pointed out that 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 a greater wage indefinitely. 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.

The employer's alternate approach is to attack the evidence supporting the decision to apply KRS 342.730(1)(c)1, asserting that "[t]here is not one word of evidence" that the claimant is unlikely to be able to continue earning a wage that equals or exceeds his wage at the time of injury indefinitely. Having considered the evidence and the employer's arguments, we are convinced that the decision was reasonable.

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 of 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).

The employer complains that testimony from Drs. Templin and Iyer regarding the claimant's ability to continue to perform his job was conclusory. The employer notes that Dr. Templin did not impose permanent restrictions but overlooks the fact that he listed a number of activities that the claimant should avoid and clearly stated the consequences of a failure to do so. Although the employer asserts that Dr. Iyer was unaware of the type of work the claimant performed, Dr. Iyer's report states clearly that the claimant he was "a skilled laborer" and "worked as a welder."

The ALJ's recitation of the evidence indicates that the claimant acknowledged having a 35-pound lifting restriction before the alleged incidents. Contrary to what the employer would have us believe, there was evidence of a reduction in the amount of weight that the claimant's physicians recommended he lift after the January, 2002, injury. Moreover, it was within the ALJ's discretion to rely on the claimant's testimony that he did not presently lift more than 25 pounds, and a reasonable inference from his testimony was that he had been able to lift heavier objects before his lower back injury. Questioned whether he still did the same job that he did at the time he was hurt, the

claimant testified, "No, I don't weld tailgates no more." Asked why, he testified, "Because I can't stand the lifting and tugging on them." A reasonable inference from the testimony was that the claimant did not weld tailgates after his back injury but that he had done so before the injury.

The remaining line of attack is the assertion that the ALJ failed to address the claimant's future wage-earning capacity and that the Board simply shored up the lack of evidence by drawing previously-mentioned inferences from the record. 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 or failed to make all essential findings. The ALJ began the analysis by noting, correctly, that under Fawbush v. Gwinn, supra, the matter to be decided was whether the claimant was likely to be able to continue to earn a wage that equaled or exceeded his wage at the time of the injury indefinitely. Deciding in the claimant's favor, the ALJ noted his history of heavy manual labor, his herniated disc, his "restrictions against doing much of the work he has done in the past," and the fact that he was working outside his restrictions while in pain.

There was ample evidence in the record to support both the findings of fact and the decision to apply KRS 342.730(1)(c)1. The decision was reasonable under the circumstances and was properly affirmed on appeal.

The decision of the Court of Appeals is affirmed.

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

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