

**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**NOT TO BE PUBLISHED OPINION**

**THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**

RENDERED: DECEMBER 18, 2008  
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2008-SC-000224-WC

DATE 1/8/09 Kelly Klaber D.C.

WILBUR D. PASSMORE

APPELLANT

V.  
ON APPEAL FROM COURT OF APPEALS  
CASE NO. 2007-CA-000345-WC  
WORKERS' COMPENSATION BOARD NO. 03-02143

LOWES HOME CENTER;  
HONORABLE R. SCOTT BORDERS,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

**MEMORANDUM OPINION OF THE COURT**

**REVERSING AND REMANDING**

An Administrative Law Judge (ALJ) determined that the claimant lacked the physical capacity to return to the type of work performed at the time of injury but was only partially disabled. A summary order denied the claimant's petition for reconsideration, which requested specific findings regarding alleged errors of fact and misinterpretations of the evidence regarding disability. The Workers' Compensation Board vacated and remanded for additional findings of fact, convinced that apparent misstatements or misunderstandings in the ALJ's recitation of the evidence rendered the basis for the decision unclear. The Court of Appeals reversed, however, reasoning that the ALJ performed

adequate fact-finding, drew reasonable inferences from the evidence, and rendered an award based upon substantial evidence.

Appealing, the claimant asserts that the ALJ erred by misstating or misunderstanding evidence that was relevant to determining the extent of his disability and by failing to provide a sufficient explanation of the basis for the ultimate conclusion. He supports the assertion by noting that the Court of Appeals acknowledged the need to "set forth the relevant evidence neglected by the ALJ." He argues that the Court of Appeals erred by reversing the Board and that substantial evidence did not support the ultimate conclusion.

We reverse to the extent that the circumstances warranted additional findings. Although the record contained substantial evidence to support the finding of partial disability, it also contained substantial evidence that, if believed, would have supported a finding of total disability. The ALJ erred by denying the claimant's petition for reconsideration summarily because it is impossible to determine from the opinion and award whether the finding of partial disability was the product of reasonable inferences drawn from a consideration and accurate understanding of all of the evidence.

The claimant was born in 1959 and has a sixth-grade education with no specialized or vocational training. He attempted to earn a GED certificate but did not succeed. He worked for various sawmills, as a bundler for Russell Sportswear, as a sewing machine operator for Fruit of the Loom from 1988 until 1999, and for about a year as a tractor-trailer driver. In March 2001 he

began working for the defendant-employer, delivering, unloading, and setting up appliances. His application for benefits alleged that the effects of three work-related accidents rendered him unable to work.

The claimant testified three times, twice in depositions and once at the hearing. He stated in the initial deposition that he injured his neck in November 2001, when he wrecked a forklift. He injured his lower back in September 2002, while lifting a refrigerator from a trailer, and again in July 2003, while moving a large appliance. He testified in the second deposition that Dr. El-Kalliny performed low back surgery in October 2004, and released him to return to work in early 2005. Although he attempted to do so, the employer had no work within his restrictions. He testified that the employer paid temporary total disability benefits while he recovered from the surgery. Although he had not looked for other work and considered himself to be incapable of working, he had not applied for social security disability benefits at the time of the deposition. He testified at the hearing that he was incapable of being on his feet or walking for eight hours per day and that he had applied for social security disability benefits.

The ALJ addressed each of the claimant's three testimonies separately when summarizing the lay and medical evidence. Although the summary of the second deposition noted that the claimant had not applied for social security disability benefits, the summary of the hearing testimony failed to note that he had applied since the deposition. When summarizing Dr. El-Kalliny's

testimony, the ALJ stated that he reduced the maximum amount the claimant should lift from 30 pounds to 10 pounds "based on the Plaintiff's complaint that he cannot lift 30 pounds." The ALJ relied on medical evidence that the claimant failed to relate his initial complaints of neck pain to an injury at work and determined that the cervical spine condition was not work-related. Based on evidence from Drs. Lessonberry, Kriss, and El-Kalliny, the ALJ found that the 2002 incident caused a herniated lumbar disc and that the 2003 incident caused only an exacerbation of the 2002 injury. Although acknowledging medical evidence that the injury precluded a return to work for the defendant-employer as well as the claimant's credible testimony and lack of academic ability, the ALJ determined that he failed to prove that he was totally disabled.

Convinced that he should be able to find work within his restrictions if motivated to do so, the ALJ noted, "The Plaintiff even admitted he felt he could work in a job where he could alternate sitting and standing and not have to do excessive lifting." The ALJ awarded an income benefit that was based on a 13% permanent impairment rating, multiplied by 3 due his inability to return to the work he performed at the time of injury and by 0.4 due to his sixth-grade education.

The claimant's petition for reconsideration requested additional findings on the ground that the ALJ committed errors of fact and misinterpreted certain evidence when finding him to be only partially disabled. He argued that the ALJ erred by stating that he did not apply for social security disability benefits

despite his hearing testimony to the contrary; that Dr. El-Kalliny did not state that his lifting restrictions were revised based on his subjective complaints; and that he did not admit that he could work in a job where he could alternate sitting and standing. The ALJ denied the petition summarily, after which he appealed.

Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973), stands for the principle that the parties are entitled to findings of fact sufficient to apprise them of the basis for the decision and to permit a meaningful appellate review.<sup>1</sup> What findings are sufficient depends upon the case. Although the Court of Appeals found testimony that would have permitted a reasonable inference that the claimant's complaints played a role in Dr. El-Kalliny's decision to increase his restrictions and that the claimant thought he could work with alternate sitting and standing, the testimony would also have permitted other reasonable inferences. We agree with the Board that the circumstances warranted the claimant's request for additional findings.

The record in this case contains substantial evidence to support a finding of partial disability, but it also contains substantial evidence that, if believed, would have supported a finding of total disability. Thus, the claimant was entitled to be certain that the ALJ considered and understood all of the relevant

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<sup>1</sup> See also Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988), and Shields v. Pittsburgh and Midway Coal Mining Company, 634 S.W.2d 440 (Ky. App. 1982).

evidence when finding him to be only partially disabled. Although a social security determination is largely irrelevant to a workers' compensation claim, an injured worker's testimony that he failed to apply for social security disability benefits would tend to indicate that he does not truly consider himself to be totally disabled. The ALJ failed to make clear when summarizing the evidence whether he was aware that the claimant had applied for social security disability benefits as of the hearing; whether he considered and understood all of Dr. El-Kalliny's testimony regarding the lifting restriction; and whether he considered and understood all of the claimant's testimony regarding his ability to perform work with a sit/stand option. It is impossible under the circumstances to determine whether the finding of partial disability was the product of reasonable inferences based upon a consideration and accurate understanding of all of the evidence.

The decision of the Court of Appeals is reversed, and this claim is remanded to the ALJ for further proceedings.

All sitting. All concur.

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