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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: AUGUST 25, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000697-WC

WILLIAM COUCH, JR. APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2010-CA-000074-WC
WORKERS' COMPENSATION NO. 08-00181

BLEVINS LOGGING;
HONORABLE DOUGLAS GOTT,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Workers' Compensation Board affirmed an Administrative Law Judge's (ALJ's) decision to dismiss the claimant's application for benefits with respect to an alleged low back injury and to limit the award for his right arm injury to temporary medical benefits. This appeal is taken from a Court of Appeals decision to affirm the Board.

The claimant asserts that the Board and the Court of Appeals employed an improper standard of review and that the ALJ failed to base the decision on substantial evidence. We affirm for the reasons stated herein.

The claimant worked as a truck driver and mechanic for Blevins Logging, which was owned by his first cousin, Vernis "Pot" Blevins. His application for

benefits alleged that he injured his low back and left leg while lifting a brake drum at work on August 12, 2007. He amended the application subsequently to include a work-related right arm injury that allegedly occurred on April 14, 2007.

The claimant testified that he injured his right arm when he "caught" it while working on a truck with Blevins and testified that he injured his low back twice. The first incident occurred when he and Doug Lamb were putting tires on a truck. He stated that he began to experience left leg pain after the incident. The second incident occurred about three weeks later, when the claimant was lifting a 180-pound brake drum with Marty Middleton. The incident occurred on a Saturday, but he did not recall on what day of August, September, or October 2007. He testified that Middleton and Lamb helped him to his truck after the incident. Then he went home. He saw the doctor the next day and never returned to work.

The contested issues included whether the claimant sustained an injury as defined in KRS 342.0011(1) as well as notice, work-relatedness, extent and duration of disability, and medical benefits. The ALJ characterized the dispute as being a "swearing contest" in which the relevant witnesses' testimony was both "reliable and credible, yet also suspect and dubious." Having concluded that the claimant failed to meet his burden of proving that he injured his low back on or about August 12, 2007, the ALJ dismissed the claim. The ALJ found that the claimant was entitled to some medical benefits for his arm

injury but that no medical evidence supported an award of temporary total or permanent partial disability benefits or an award of future medical benefits.

The claimant maintains that he has met his burden of proving that he is occupationally disabled by work-related arm and back injuries. He raises two arguments. First, he argues that the standard of review set forth in *Western Baptist Hospital v. Kelly*[1] "vests too much discretion with an Administrative Law Judge and allows no meaningful avenue for a party to seek justice from an arbitrary decision." Second, he argues that the ALJ's decision was not supported by substantial evidence and requests the court to end the practice of permitting an ALJ to "cherry pick" from the evidence "in order to support a desired result rather than the rational result called for by the evidence." He concludes that the substantiality of evidence takes into account what detracts from its weight and that "[t]he credibility of the evidence is the decisive issue."[2]

I. STANDARD OF REVIEW.

An injured worker bears the burden of proof and risk of non-persuasion before the ALJ with regard to every element of his claim.[3] KRS 342.285 designates the ALJ as the finder of fact in workers' compensation cases. It permits an appeal to the Board but provides that the ALJ's decision is "conclusive and binding as to all questions of fact" and, together with KRS

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[1] 827 S.W.2d 685 (Ky. 1992).

[2] *Pierce v. Kentucky Galvanizing Co., Inc.*, 606 S.W.2d 165 (Ky. App. 1980).

[3] *See Roark v. Alva Coal Corporation*, 371 S.W.2d 856 (Ky. 1963); *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky.App. 1984); *Snawder v. Stice*, 576 S.W.2d 276 (Ky.App. 1979).

342.290, prohibits the Board or a reviewing court from substituting its judgment for the ALJ's "as to the weight of evidence on questions of fact." KRS 342.285 gives the ALJ the sole discretion to determine the quality, character, and substance of evidence.[4] 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 party's total proof.[5] KRS 342.285(2) and KRS 342.290 limit administrative and judicial review of an ALJ's decision to determining whether the ALJ "acted without or in excess of his powers;"[6] whether the decision "was procured by fraud;"[7] or whether the decision was erroneous as a matter of law.[8] Legal errors would include whether the ALJ misapplied Chapter 342 to the facts; made a clearly erroneous finding of fact; rendered an arbitrary or capricious decision; or committed an abuse of discretion.

The courts have construed KRS 342.285 to require a party who appeals a finding that favors the party with the burden of proof to show that no substantial evidence supported the finding, *i.e.*, that the finding was unreasonable under the evidence.[9] A party who fails to meet its burden of

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[4] *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985).

[5] *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

[6] KRS 342.285(2)(a).

[7] KRS 342.285(2)(b).

[8] KRS 342.285(2)(c), (d), and (e). *See also American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Commission*, 379 S.W.2d 450, 457 (Ky. 1964).

[9] *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986); *Mosley v. Ford Motor Co.*, 968 S.W.2d 675 (Ky. App. 1998); *REO Mechanical v. Barnes*, 691 S.W.2d 224 (Ky. App. 1985).

proof before the ALJ must show that the unfavorable finding was clearly erroneous because overwhelming favorable evidence compelled a favorable finding, *i.e.*, no reasonable person could have failed to be persuaded by the favorable evidence.[10] Evidence that would have supported but not compelled a different decision is an inadequate basis for reversal on appeal.[11]

Contrary to the claimant's assertion, *Western Baptist Hospital v. Kelly* has no effect on an ALJ's authority under KRS 342.285. It addresses the impact of *Vessels v. Brown-Forman Distillers Corp.*[12] on the standard of review to be employed by the Court of Appeals and Supreme Court in workers' compensation cases. The Board and the Court of Appeals determined in *Kelly* that the ALJ's finding of fact was erroneous as a matter of law because the evidence compelled a decision in the worker's favor. The Supreme Court affirmed, refusing to engage in yet a third in-depth review of the evidence. Illustrating the futility of the appeal, the court noted that the appellants pointed to no evidence overlooked or misunderstood by the Board and the Court of Appeals. They failed to show that the view of the evidence taken by the Board and the Court of Appeals was patently unreasonable or flagrantly implausible, and they failed to show that the Board or the Court of Appeals overlooked or misconstrued a controlling statute or precedent. *Kelly* changed nothing. It merely emphasized that the Supreme Court's function is not to

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[10] *Id.*

[11] *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46 (Ky. 1974).

[12] 793 S.W.2d 795 (Ky. 1990).

reweigh the evidence on a question of fact but to determine whether the Court of Appeals erred as a matter of law.

II. SUBSTANTIAL EVIDENCE.

The Board and the Court of Appeals acted properly by affirming the ALJ's decision because the findings that supported it were reasonable.[13] A decision that is reasonable under the evidence is not arbitrary. Although the claimant points to some evidence that supported his version of the events, the evidence was not so overwhelming as to render the decision that was made unreasonable and compel a favorable finding.

Convinced that the claimant did not sustain the alleged back injury, the ALJ noted first that the medical records rebutted his testimony. They indicated that he sustained a low back injury while working for a different employer in 1994; that he applied for social security disability in 1998, due in part to a low back condition; that his back condition was "chronic" as of 2001; and that he had osteoarthritis of the low back in 2004. No treatment note mentioned a recent back injury, including the note from August 14, 2007. The history received on October 1, 2007 included left hip and leg weakness of six months' duration but no mention of a work-related incident. Finally, the history given to Dr. Muffly, who evaluated the claimant in support of his claim, referred only generally to an injury that occurred while performing mechanic work.

The ALJ found the testimony given by Shawna Eldridge to be credible in light of the medical records. Eldridge stated that the claimant had voiced

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[13] *Special Fund v. Francis,* 708 S.W.2d at 643.

complaints concerning longstanding back problems but never reported a work-related back injury. The ALJ noted that the claimant could not identify a specific date of injury but found more significant the fact that Middleton denied any knowledge of the second alleged back injury. The claimant then supported his own version of the events with testimony from Jeff Bush. Bush testified that the claimant injured his back when changing some brakes and tires on a Saturday. He did not know whether Middleton was present when the injury occurred but knew that he was on the property at the time. He stated that he alone helped the claimant to his truck. The ALJ found Bush's testimony to be unimpressive, noting that the claimant never mentioned his presence when testifying and that Lamb, whom the claimant testified had helped him to his truck, did not testify.[14]

The only medical evidence with respect to the alleged right arm injury was a treatment note from April 16, 2007 that documented a work-related arm contusion. The ALJ found treatment of the contusion to be compensable. When dismissing the claim for permanent income and future medical benefits, the ALJ noted specifically that no off work slip or other medical evidence supported an award of temporary total, permanent partial benefits, or future medical benefits for the injury.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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[14] The claimant testified that Middleton was present when the injury occurred and that Middleton and Lamb helped him to his truck.

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