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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: SEPTEMBER 22, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000829-WC

JESSIKA MOORE — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2009-CA-002387-WC
WORKERS' COMPENSATION NO. 99-64413

PIZZA HUT, INC.;
HONORABLE HOWARD E. FRASIER, JR.,
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) findings with respect to the claimant's average weekly wage and the calculation of her permanent partial disability benefits under the 1999 version of Chapter 342. The Court of Appeals affirmed the Board. Appealing, the claimant argues that the ALJ miscalculated her average weekly wage and misconstrued KRS 342.730(1)(c) and (d) when calculating her permanent partial disability benefits.

We affirm. The ALJ stated a reasonable basis for rejecting the claimant's uncontradicted testimony concerning the amount of income that she thought

she would receive from tips and overtime. Moreover, the ALJ applied KRS 342.730(1)(d) properly to these facts by limiting the income benefit payable for the claimant's greater-than-50% disability rating to 99% of 66 2/3% of her average weekly wage. The ALJ also acted properly on these facts by awarding benefits equal to one-half that amount during periods of employment at the same or a greater wage.

The claimant began working for the defendant-employer in March 1999, taking orders, entering them into the computer, and running the cash register as well as waitressing occasionally. In mid-June 1999 she began training for a position as a buffet manager. She sustained a work-related injury to her right wrist on July 15, 1999 but continued to work through August 19, 1999, after which her employer paid temporary total disability (TTD) benefits through March 3, 2002. She sought workers' compensation benefits based on the injury's physical and psychological effects.

The claimant testified that she earned $6.00 per hour at the time of her injury and thought that her training would last an additional month. Wage records submitted by the employer indicated that she worked 33.12 hours during her first two-week pay period, which ended on March 17, 1999. She worked 96.74 hours during the two-week period that ended on July 21, 1999 but stated that most of the overtime hours occurred before her injury. She stated that her tips averaged an additional $150.00 to $200.00 per week but acknowledged that she did not report them for income tax purposes. She

worked for a different employer when the claim was heard, earning $12.00 per hour and working 40 hours per week.

The claimant relied on KRS 342.140(4) and (6) to assert that her average weekly wage as a trainee should be $434.00. She testified that she expected to earn $8.00 per hour as a buffet manager, working forty hours per week. She testified that she would also have the opportunity to work overtime when necessary to finish preparation for the coming day or to fill in for other employees. Noting her overtime during the July 21, 1999 pay period, she stated that she thought her overtime as a buffet manager would be more than eight hours per week. She thought that she would also receive at least $10.00 per day in tips.

The ALJ found that the injury produced a 47% permanent impairment rating; that the claimant lacked the physical capacity to return to the type of work performed at the time of her injury; and that she returned to work at the same or a greater wage. Turning to the average weekly wage calculation, the ALJ construed the use of the word "may" rather than "shall" in KRS 342.140(4) as permitting an ALJ to consider evidence that under normal conditions the trainee's wage should be expected to increase during the period of disability. Convinced that the claimant was a hard worker and would have achieved the position of buffet manager had she not been injured, the ALJ determined that KRS 342.140(4) permitted her average weekly wage to be based on evidence of what she would have earned in the position. The ALJ found the claimant's

average weekly wage to be $320.00 based on her testimony that she would have earned $8.00 per hour for a forty-hour week as buffet manager but rejected her testimony concerning the amount of overtime and tips as being too speculative to permit them to be included.

The ALJ calculated the claimant's weekly benefit for permanent partial disability as follows: $320.00 [average weekly wage] x 47% [impairment rating] x 2.5 [per KRS 342.730(1)(b)] x 1.5 [per KRS 342.730(1)(c)1] = $375.99. The ALJ halved the benefit during periods that the claimant earned the same or a greater wage than at the time of her injury. As amended pursuant to the employer's petition for reconsideration, the award limited the weekly benefit to a maximum of $211.21 (*i.e.*, to 99% of 66 2/3% of the claimant's average weekly wage) as required by KRS 342.730(1)(d) and *Stewart v. Kiah Creek Mining.*[1] The amended award provided a weekly benefit of $105.61 under KRS 342.730(1)(c)2 during periods that the claimant earned a wage the same or greater than she earned at the time of her injury.

I. AVERAGE WEEKLY WAGE CALCULATION.

The claimant asserts that the ALJ erred by rejecting her unrebutted proof concerning the overtime and tips she expected to earn as a buffet manager. She argues that the overtime she worked during the July 21, 1999 pay period was "very reliable" evidence of the overtime she would have worked in the future. Noting that she waited tables sometimes because waitresses left at 3:00 p.m. and that she testified she could not imagine making less than $10.00

[1] 42 S.W.3d 614 (Ky. 2001).

per day in tips, she argues that the evidence compelled the inclusion of tips in her average weekly wage. We disagree.

KRS 342.140(4) states as follows:

> If the employee was a minor, apprentice, or trainee when injured, and it is established that under normal conditions his wages should be expected to increase during the period of disability, that fact may be considered in computing his average weekly wage.

KRS 342.140(4) permits an ALJ to base the average weekly wage of a trainee on evidence of the worker's probable future earning capacity as it existed immediately before injury, *i.e.*, what the claimant's wages in the buffet manager position probably would have been absent the injury. It requires the trainee to prove not only that the wage earned at the time of the injury should be expected to increase under normal conditions but also to prove the amount of the increase.[2]

The ALJ found the claimant to be a credible witness but found her testimony concerning the amount of overtime she would work and the amount of tips she would earn as a buffet manager to be too speculative to be reliable. When denying her petition for reconsideration, the ALJ explained that unrebutted testimony that is too speculative may be rejected, especially when its purpose is to predict future income.

The claimant had the burden to submit substantial evidence to permit a reasonable finding concerning the amount of her future average weekly wage as

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[2] *See City of Paintsville v. Ratliff*, 889 S.W.2d 784 (Ky. 1994).

a buffet manager.[3] An average weekly wage projection must be probable rather than merely speculative[4] if it is to be considered reasonable rather than arbitrary.[5] Nothing requires an ALJ to rely on testimony that the ALJ finds to be speculative simply because it is unrebutted.[6]

The Court of Appeals did not err by affirming the decision not to include overtime hours and tips in the claimant's average weekly wage projection. Evidence that she worked a certain number of overtime hours during a single two-week period was no so overwhelming as to compel a finding that she probably would have worked the same number of overtime hours each pay period as a buffet manager. Likewise, her self-serving testimony that she thought she would earn $10.00 per day in tips as a buffet manager did not compel the inclusion of tips in the average weekly wage projection.[7]

II. KRS 342.730(1)(d).

Chapter 342 provides income benefits to compensate for part of the injured worker's loss of earning capacity.[8] KRS 342.730(1)(a) and (b) base the income benefit calculation for total or partial disability on the injured worker's

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[3] *See Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

[4] Speculative testimony theorizes about a matter of which the witness has no certain knowledge. *See* BLACK'S LAW DICTIONARY 1407 (7th ed. 1999).

[5] *See* KRS 342.285(2)(e).

[6] See *Commonwealth v. Workers' Compensation Board of Kentucky*, 697 S.W.2d 540 (Ky. App. 1985) (even the uncontradicted testimony of a medical expert may be rejected if a reasonable explanation is given, *i.e.*, if it is speculative).

[7] *See Grider Hill Dock, Inc. v. Sloan*, 448 S.W.2d 373 (Ky. 1969) (even the uncontradicted testimony of an interested witness does not bind the fact-finder).

[8] *See Adkins v. R & S Body Company*, 58 S.W.3d 428, 431-32 (Ky. 2001). *Adkins* explains that workers' compensation is not a quasi tort. Income benefits replace some of the income lost due to industrial injury.

average weekly wage and on the disability the injury produces. The statutes limit the maximum average weekly wage for the purpose of the calculation to 100% and 75% of the state average weekly wage respectively, which has the effect of limiting the maximum benefit.

KRS 342.730(1)(a) permits a totally disabled worker to receive lifetime benefits equal to 66 2/3% of the average weekly wage earned at the time of the injury but not more than 100% of the state average weekly wage. KRS 342.730(1)(b) permits a partially disabled worker to receive a period of weekly benefits that equal 66 2/3% of the average weekly wage earned at the time of the injury but not more than 75% of the state average weekly wage, multiplied by the worker's percentage disability rating. The courts have determined that a worker may not be compensated for more than total disability at one time, even when multiple partially disabling injuries produce disabilities that total more than 100%.[9]

KRS 342.730(1)(c) and (1)(d) operate together with KRS 342.730(1)(b) to provide various enhancements and limitations with respect to partial disability awards. The version of KRS 342.730(1)(c)1 that applies to this claim permits a worker who does not retain the physical capacity to return to the type of work performed at the time of the injury to receive a partial disability benefit of 1.5

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[9] *See Leslie County Fiscal Court v. Adams*, 965 S.W.2d 152 (Ky. 1998); *General Refractories Co. v. Herron*, 566 S.W.2d 433 (Ky. App. 1977); *Cabe v. Skeens*, 422 S.W.2d 884 (Ky. 1967); *Osborne Mining Corporation v. Blackburn*, 397 S.W.2d 144 (1965); *Dunn v. Eaton*, 26 S.W.2d 513 (Ky. 1930).

times the amount otherwise determined under KRS 342.730(1)(b).[10] KRS 342.730(1)(d) provides a compensable period of 425 weeks for a worker whose disability rating is 50% or less, but it provides 520 weeks of benefits for a worker such as the claimant, whose disability rating exceeds 50%. KRS 342.730(1)(d) also provides as follows:

> Benefits payable for permanent partial disability shall not exceed ninety-nine percent (99%) of sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage as determined under KRS 342.740 and shall not exceed seventy-five percent (75%) of the state average weekly wage, except for benefits payable pursuant to paragraph (c)1. of this subsection, which shall not exceed one hundred percent (100%) of the state average weekly wage, nor shall benefits for permanent partial disability be payable for a period exceeding five hundred twenty (520) weeks, notwithstanding that multiplication of impairment times the factor set forth in paragraph (b) of this subsection would yield a greater percentage of disability.

Like KRS 342.730(1)(a) and (1)(b), KRS 342.730(1)(d) limits the maximum benefit based on a portion of the worker's average weekly wage and 75%[11] or 100%[12] of the state's average weekly wage.

In *Stewart v. Kiah Creek Mining*[13] the court considered various effects that the statutory factor provided in KRS 342.730(1)(b) and the 1.5 multiplier provided in KRS 342.730(1)(c)1 had on the partial disability benefit calculation.

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[10] This claim involves the 1996 version of KRS 342.730(1)(c)1. 1996 Ky. Acts (1st Ex. Sess.) ch. 1, § 66. KRS 342.730(1)(c)1 was amended in 2000 to provide the 3 multiplier that remains in use today. 2000 Ky. Acts ch. 514, § 28.

[11] *See* KRS 342.730(1)(b).

[12] *See* KRS 342.730(1)(a).

[13] 42 S.W.3d 614, 617 (Ky. 2001).

Among them were partial disability ratings greater than 100% and enhanced partial disability benefits greater than the maximum for permanent total disability. The court concluded that the plain language of KRS 342.730(1)(d) is clear and limits the maximum partial disability benefit to 99% of 66 2/3% of the worker's average weekly wage and also limits it to 75% of the state average weekly wage unless KRS 342.730(1)(c)1 applies, in which case it limits the maximum partial disability benefit to 100% of the state average weekly wage.

KRS 342.730(1)(c) and (1)(d) refine the calculation of partial disability benefits provided in KRS 342.730(1)(b) to account more precisely for the impact of an injury on the worker's earning capacity. KRS 342.730(1)(d) permits partially disabled workers who lack the physical capacity to return to the type of work performed at the time of the injury to receive up to 99% of the maximum benefit allowed for total disability. It permits partially disabled workers whose disability rating exceeds 50% to receive 520 weeks of benefits rather than 425 weeks. The limitations it contains are consistent with the principle that prohibits partial disability benefits from exceeding the maximum allowed for total disability.

The claimant disagrees with the *Stewart* court's conclusion that the meaning of KRS 342.730(1)(d) is clear. She argues that the "'except' clause overrides both of the preceding limiting phrases rather than only the second limiting phrase." She views KRS 342.730(1)(d) as limiting benefits payable under KRS 342.730(1)(c)1 to 100% of the state's average weekly wage without

regard to the worker's average weekly wage. What she disregards is that her interpretation of the statute would yield a partial disability benefit greater than the maximum allowed for total disability. Even if we were to agree for the purpose of discussion that KRS 342.730(1)(d) was unclear and subject to interpretation, we are not convinced that the legislature would have intended such an absurdity.

The ALJ did not err. The claimant's lack of the physical capacity to return to the type of work she performed at the time of injury entitled the benefit calculated under KRS 342.730(1)(b) to be multiplied by 1.5 under KRS 342.730(1)(c)1. Her greater than 50% disability rating entitled her to 520 weeks of benefits under KRS 342.730(1)(d), which also limited her benefit to 99% of 66 2/3% of her average weekly wage and 100% of the state average weekly wage.

III. KRS 342.730(1)(c)2.

KRS 342.732(1)(c)2 rewards a partially disabled worker who returns to work at the same or a greater wage by permitting the worker to receive one-half the benefit "otherwise payable" in addition to the wage. At the time of the claimant's injury, KRS 342.730(1)(c)2 stated as follows:

> 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 otherwise payable under paragraph (b) of this subsection shall be reduced by one-half (1/2) 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 restored to the rate prescribed in paragraph (b) of this subsection.

For periods in which the claimant earned an average weekly wage the same or greater than when injured, the ALJ calculated her enhanced partial disability benefit under KRS 342.730(1)(b) and KRS 342.730(1)(c)1 and limited it under KRS 342.730(1)(d). The ALJ then reduced that amount by one-half under KRS 342.730(1)(c)2, which yielded a weekly benefit of $105.61.[14]

The claimant asserts that KRS 342.730(1)(b), (1)(c)1, (1)(c)2, and (1)(d) should be applied sequentially, which would yield a weekly benefit of $188.00 during periods that she earned the same or a greater wage than when injured. In other words, she argues that the benefit should be calculated under KRS 342.730(1)(b); enhanced under KRS 342.730(1)(c)1; reduced by one-half under KRS 342.730(1)(c)2; and then limited under KRS 342.730(1)(d). We disagree.

The ALJ acted properly on these facts. The claimant's benefit during periods that she earned the same or a greater wage equaled one-half the amount awarded under KRS 342.730(1)(b) as enhanced under KRS 342.730(1)(c)1, *i.e.*, half of $211.21. As noted by the Court of Appeals, the calculation the claimant proposes would reduce the benefit "otherwise payable"

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[14] ALJs commonly applied both subsections of the 1996 version of KRS 342.730(1)(c) concurrently when the facts allowed. Unlike the 1996 version of the statute, the 2000 version separates subsections 1 and 2 with the word "or" and requires an ALJ to choose the more appropriate subsection based on the facts. *Fawbush v. Gwinn*, 103 S.W.3d 5, 12 (Ky. 2003).

for partial disability by only $22.21 rather than by one-half as required by KRS 342.730(1)(c)2.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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