RENDERED: JULY 18, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000330-WC

BLUE GRASS COOPERAGE — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-73053

DENNIS SHEA; HONORABLE LAWRENCE F. SMITH, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND WINE, JUDGES.

LAMBERT, JUDGE: Blue Grass Cooperage appeals the Workers' Compensation Board opinion affirming the use of the 3x multiplier in Dennis Shea's PPD benefits pursuant to KRS 342.730. After careful review, we affirm.

On April 4, 2005, Dennis Shea (hereinafter "Shea") injured his right ankle while moving a whiskey barrel at Blue Grass Cooperage. On February 21,

2007, Shea filed an Application for Resolution of Injury Claim. The claim was assigned to an ALJ and set for a Benefit Review Conference on July 9, 2007. At that review conference, the parties identified contested issues, including the extent and duration of Shea's disability. The parties agreed, however, that Shea had returned to work for Blue Grass Cooperage at the same job and for the same or greater wages.

During the course of litigation on this claim, Shea underwent independent medical evaluations by Dr. Bilkey in November 2006 and by Dr. Loeb in June 2007. Dr. Bilkey assessed a nine percent permanent partial impairment (PPI) and recommended Shea avoid carrying items for any significant lengths, avoid prolonged gait, and a maximum lifting restriction of up to fifty pounds. He further noted that despite his recommendations, Shea had returned to work and was tolerating it with work boots. Dr. Loeb assessed a four percent PPI and did not provide any work limitations. Dr. Loeb found that Shea needed no further medical treatment with reference to the work injury and found no evidence of a limp or loss of muscle strength in the right leg.

Despite the parties' stipulation that Shea in fact had returned to his former position, Shea argued at the formal hearing on July 23, 2007, that he was entitled to Permanent Partial Disability (PPD) benefits inclusive of the 3x multiplier found in KRS 342.730(1)(c)1. On September 18, 2007, the ALJ issued an opinion wherein Shea was awarded PPD benefits enhanced by the 3x multiplier. The ALJ found that Shea had returned to work at the same or greater wages, but

was concerned about the likelihood of his ability to continue working for Blue Grass Cooperage at his present wages for the indefinite future. Specifically, the ALJ stated:

> [t]he plaintiff has returned to work at the same or greater wages. However, he is concerned about the likelihood of his ability to continue working as a general laborer. His duties require that you walk a variety of distance[s] while performing his job duties. He now has a pronounced limp that profoundly interferes with his gait. With a degree in and of his permanent impairment at his pronounced limp, it is unlikely that he will be able to continue earning a wage that equals or exceeds the wage at the time of the injury 'for the indefinite future.' See Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). Accordingly, I find the Plaintiff qualifies for the enhancement provisions of KRS 342.730(1)(c)1.

Blue Grass Cooperage filed a petition for reconsideration, wherein it argued that since Shea has returned to his pre-injury position and has no medical restrictions that preclude him from doing so, it was error as a matter of law for Shea to receive an award of PPD benefits enhanced by the 3x multiplier. The ALJ denied the petition for reconsideration. Blue Grass Cooperage appealed to the Workers' Compensation Board, who affirmed the ALJ's decision. This appeal followed.

Blue Grass Cooperage argues that the ALJ erred as a matter of law in awarding PPD benefits inclusive of the 3x multiplier found in KRS 342.730(1)(c)1. Our standard of review of Workers' Compensation Board decisions is well known in that our function "is to correct the Board only where the [ ] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or

committed an error in assessing the evidence so flagrant as to cause gross injustice." *AK Steel Corp. v. Childers*, 167 S.W.3d 672, 675 (Ky.App. 2005). In the instant case, the Board reviewed the ALJ's decision for an abuse of discretion and found none. Specifically, the Board found that the ALJ had properly interpreted *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003) and KRS 342.730(1)(c)1 and (1)(c)2. We agree.

KRS 342.730(1)(c)1 and (1)(c)2 provide 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 the injury, the benefit for permanent partial disability shall be multiplied by (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.

In *Fawbush v. Gwinn*, the Kentucky Supreme Court concluded that in those instances in which both KRS 342.730(1)(c)1 and (1)(c)2 apply, the ALJ is authorized to determine which provision is more appropriate based upon the facts of the individual claim. We find no error in the ALJ's and the Workers'

Compensation Board's analysis under *Fawbush v. Gwinn*. The parties had stipulated that Shea had returned to work earning the same or greater wage as at the time of his injury. Thus, the 2x multiplier under KRS 342.730(1)(c)2 potentially applies. The ALJ reasonably inferred from Dr. Bilkey's restrictions and recommendations and the nature of Shea's job duties at Blue Grass Cooperage that Shea no longer truly retains the physical capacity to perform the type of work he performed at the time of the injury, despite his ongoing efforts to do so. Accordingly, the 3x multiplier under KRS 342.730(1)(c)1 is also applicable.

Under *Fawbush v. Gwinn*, the ALJ has the discretion to determine which provision was more appropriate based on the facts of the individual claim. The ALJ's decision that Shea is unlikely to be able to earn a wage equal to or greater than his average weekly wage into the indefinite future is supported by substantial evidence, given the nature of Shea's ongoing job duties, his degree of impairment, and his physical restrictions. Accordingly, we find no error with the ALJ's decision to apply the 3x multiplier, or with the Workers' Compensation Board's affirmation of that decision.

Therefore, we affirm the opinion entered by the Workers' Compensation Board on January 18, 2008.

ALL CONCUR.

BRIEF FOR APPELLANT

Lyn Douglas Powers
Louisville, Kentucky

BRIEF FOR APPELLEE DENNIS SHEA:

Robert D. Walker, II
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