RENDERED: January 10, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001588-WC

MICHAEL CASPER — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-99-88520

SUPERIOR CARE HOME, INC.;
NCA, INC., on behalf of RELIANCE
NATIONAL; J. LANDON OVERFIELD,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, HUDDLESTON and JOHNSON, Judges.

HUDDLESTON, Judge: Michael Casper appeals from a Workers' Compensation Board decision affirming an administrative law judge's award to Casper of permanent partial disability benefits for a work-related shoulder injury but denying benefits for a cervical spine injury which allegedly resulted from the same incident, finding that the latter condition is entirely attributable to the effects of the natural aging process. Casper also appeals from the Board's decision to affirm the ALJ's order denying his petition for reconsideration in which he argued that both the parties and the

ALJ were bound by the parties' stipulation that Casper's injury to his cervical spine was work-related thereby precluding the ALJ's finding to the contrary.

In the introduction to his opinion, the ALJ effectively described the nature of the instant litigation:

> This is a strange case indeed [the ALJ wrote]. It entered the system March 3, 2000[,] with the filing of [Casper's] Form 101. Somewhere on the road to resolution, the parties declared war on each other. The claim has been through two [ALJ's] and, for a claim in which only the issues of extent and duration of occupational disability and the effects of the natural aging process have been reserved for determination, has produced an inordinate amount of evidence and rancor. The parties are well aware of which I speak and therefore no more will be said. [Casper] claims he is totally occupationally disabled as a result of injuries to his cervical spine, right shoulder, low back and both knees. [Superior], although stipulating a work-related injury, now argues that there was no injury proven, that [Casper] cannot be believed and that the claim should be dismissed in its entirety.

Casper was born on June 14, 1939, has an 11th grade education with specialized or vocational training in maintenance and heating and air conditioning repair, and is a certified stationary engineer. His employment history consists primarily of maintenance work (including self-employment), but he has also been

employed as a cook, production line worker and underground utility locator. Casper began his employment with Superior in September 1998 as a maintenance worker for a nursing home facility.

On October 5, 1998, while working in that capacity, Casper slipped on some ice that had been spilled on the floor in the laundry area and fell, allegedly injuring his right shoulder, neck and both knees. No one witnessed the incident. Casper has not returned to work since that time, nor has he sought employment. He currently receives $1,008.00 per month in Social Security disability benefits.

On the day after the incident in question, Casper sought treatment from his family physician who referred him to Dr. John D. Noonan, a nuerosurgeon in Paducah, Kentucky. Three days later, Casper presented to Dr. Noonan echoing his initial complaints, i.e., pain in his right shoulder, lower back, neck and both knees with the right knee being worse than the left. He gave a history of having fallen on October 5, 1998, when he slipped on ice but denied having experienced any previous injuries. Although Casper did not know exactly how he fell, he was certain that the described symptoms began afterward.

At that time, Dr. Noonan diagnosed cervical and lumbar musculoskeletal strain, neck pain and right shoulder pain. X-rays revealed degenerative facet changes in the cervical spine with no disc degeneration observed. However, a small posterior osteophyte was present at the C5-C6 level along with moderate anterior spondylosis, spurring in the lumbar spine and a posterior

osteophyte at the L4-L5 disc level without disc degeneration. Casper's right shoulder and both of his knees appeared normal.

On October 15, 1998, Casper saw Dr. Noonan again and described the pain in his right shoulder as worse than anywhere else. At that time, Dr. Noonan diagnosed chronic cervical pain, lumbago/low back pain, shoulder pain and knee pain. This diagnosis continued until November 23, 1998, with a gap in the records existing between then and May 4, 1999. Dr. Noonan prescribed physical therapy for about four weeks, ultimately referring Casper to Dr. William J. Stodghill, a local orthopedic surgeon, when his symptoms persisted.

Casper first saw Dr. Stodghill on October 30, 1998. The surgeon diagnosed a tear to the right rotator cuff and degenerative arthritis in the right shoulder and recommended surgery. On December 17, 1998, he performed a procedure which included a debridement and repair of the rotator cuff tear, neer acromnioplasty and resection of the distal aspect of the clavicle. Dr. Stodghill authored a letter dated November 19, 1999, and directed to Superior, indicating that Casper had reached maximum medical improvement as of November 10, 1999. Accordingly, he referred Casper back to Dr. Noonan, the nuerosurgeon, for further treatment. In Dr. Stodghill's estimation, Casper suffered from a 13% functional impairment to the body as a whole Aas a result of his injury for which I have treated him,@ said injury unquestionably referring to the fall on October 5, 1998. On December 15, 1999, Dr. Stodghill corresponded with a different representative from Superior and provided essentially the same

information, specifically indicating that the functional impairment rating was Aa result of the injury of October 5, 1998.@

Upon Dr. Noonan's retirement, Casper came under the care of Dr. Theodore E. C. Davies, of Noonan and Davies, P.S.C., who first saw him on May 4, 1999. Initially, Dr. Davies diagnosed cervical spondylosis without myelopathy, cervical radiculitis, cervical sprain/strain, lumbar sprain/strain and lumbar spondylosis without myelopathy. Dr. Davies then ordered a variety of tests, including a myelogram which was performed in July 1999. On July 27, 1999, Casper presented with the same complaints. Dr. Davies described the myelogram as abnormal at multiple levels and suggested cervical spine surgery. On September 2, 1999, Dr. Davies performed a cervical hemilaminotomy and foraminotomy at the C4-5, C5-6 and C6-7 levels on the right.

In response to a request for information from Superior, Dr. Davies responded in a letter dated November 15, 1999, in which he described the cervical spine surgery and concluded that Casper had not yet reached MMI, placing him in a cervicothoracic Category III. It was his opinion that Casper suffered from a permanent impairment as a result of the subject injury. He assessed a 15% functional impairment to the body as a whole, 50% of which was attributable to the work-related incident and 50% of which was due to the arousal of a pre-existing, dormant, non-disabling, degenerative condition. He did not believe that Casper could be released to return to full duty at that time as he was unable to perform the tasks his job required.

On May 8, 2000, Dr. Davies composed a ATo whom it may concern@ report, indicating that Casper was at MMI but continued to experience chronic pain and had been referred to a pain management clinic.[1] In his opinion, Casper could not return to the type of work that he had previously performed but was capable of returning to work of a sedentary nature with no lifting greater than 15 to 20 pounds, no repetitive lifting and no overhead or twisting work if such employment was available. In April 2001, Dr. Davies reported to Superior that Casper had reached MMI as of March 17, 2000.[2]

Superior filed a Form 111 on April 27, 2000, denying Casper's claim for benefits on the basis that he had failed to demonstrate that the injuries he sustained were traumatic and proximately caused by a harmful change in the human organism as evidenced by objective medical findings to the exclusion of the natural aging process. On the same day, Superior also filed a special answer alleging that Casper had refused to follow reasonable medical advice and arguing that this should effect his right to recover disability benefits.

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[1] Dr. Davies referred Casper to Dr. Monte Rommelman. In a letter of January 29, 2001, Dr. Rommelman reported to Dr. Davies that the exact etiology of Casper's complaints was unclear upon examination as he Ahas diffused break-a-way weakness in the upper extremities with non-dermatomal sensory deficits.@ Further, he described Casper's reflexes as asymmetric and found that he Adid not have any significant rotator cuff pathology@ at that time.

[2] However, Superior also introduced a letter of March 12, 2001, from Dr. Davies in which he determined that Casper had reached MMI on December 8, 1999, a conclusion which he maintained thereafter in stark contrast to his other letter. According to the ALJ, Athis is simply one more of the numerous inconsistencies in all of the medical records in this file.@

Casper was deposed twice by Superior, the first time on August 24, 2000, and the second on June 18, 2001. He also testified at the hearing on his claim. As correctly observed by the Board: AA review of the record, as well as the ALJ's opinion and award, reveals that Casper's testimony was less than candid, was contradictory, and at least with relation to his alleged back injury, was false, misleading and deceptive. The ALJ assigned little, if any, credence to Casper's testimony.@

In reference to Casper's first deposition, the ALJ observed that he was questioned regarding his work and medical history and proceeded to summarize both in detail which is unnecessary to repeat here. Significantly, Casper testified that he had never been injured while working prior to the incident at issue, at least not to a degree necessitating medical attention. Further, he indicated that a broken foot in 1953 was the only bone he had ever broken, the inference being that it was also the only serious injury he had suffered before the subject injury with the exception of a detached retina in January 2000. Likewise, he denied having filed a workers' compensation claim with any employer other than Superior and unequivocally denied having injured his back before the accident which led to the current litigation. According to Casper, none of his physicians had released him to return to work either with or without restrictions.

With respect to the second deposition, the ALJ said: AThere is not much new information in the second deposition but there are some interesting contrasts.@ He noted that there was a

much more Aadversarial tone to the proceedings.@[3] In particular, the ALJ noticed that Casper's response to a question concerning hobbies was in Astark contrast@ to his first deposition. At the hearing, Casper's testimony concerning his work for Superior, the injury in question and his subsequent medical treatment was consistent with his previous testimony and the medical records. However, beginning with the cross-examination of Casper, the remainder of the hearing Abecame a test of wills, the will of the [ALJ] included.@ He was Anot impressed with [Casper's] performance@ and believed it could properly be described as a Aperformance@ as Casper was often Aevasive and changed his testimony.@

Casper eventually admitted that he recalled being employed by Savannah Trace/National Housing Partnership in Schaumberg, Illinois, and receiving a letter from Savannah Trace dated May 8, 1996, in which a Dr. Nixon imposed certain restrictions, albeit temporary ones (an admission he recanted shortly thereafter), and that he had failed to notify Superior of both his employment with Savannah Trace and the preexisting restrictions. On March 5, 1996, he allegedly slipped on ice and fell while working for Savannah Trace, subsequently filed a workers' compensation claim (which he Afinally remembered@) for a lower back injury and apparently received a settlement. In the ALJ's view, although Athis has no bearing on [Casper's] physical condition ([Casper] has introduced no evidence of a work[-]related

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[3] Apparently, Athere appeared to be some distaste on the part of [Casper] concerning his need to give a second deposition and some of the inquiries made by counsel for [Superior]. Just from reading the transcript, the proceeding appeared to be quite testy.@

low back injury as a result of the October 5, 1998 incident), it has a bearing on [Casper's] credibility@ and Aalso has a bearing on [Superior's] multiple requests to have the claim referred to the fraud unit.@[4]

In addition to the foregoing medical evidence and the testimony of Casper, the ALJ also considered the depositions and/or reports of Dr. Thomas J. O'Brien and Dr. Gregory E. Gleis, orthopedic surgeons who evaluated Casper at the request of Superior, as well as the depositions of Dr. John Grenfell and Dr. Ralph C. Haas, vocational experts who evaluated Casper at the request of Casper and Superior, respectively.[5] The findings of Dr. Gleis and Dr. O'Brien, as summarized by the Board, were as follows:

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[4] On August 16, 2001, Superior filed a request to have Casper's claim Areferred to the fraud unit.@ Attached to that request was Aa one inch stack of photocopies@ from the Illinois workers' compensation claim which validated the related testimony elicited on cross-examination of Casper and was considered as evidence by agreement of the parties.

Ultimately, the ALJ found as follows with respect to Casper's alleged lack of veracity:

> [Superior] is correct that [Casper] appears to be a person who is not to be believed. Both the substance of [Casper's] testimony and the manner in which [Casper] delivered it at the hearing have led the undersigned to believe that [Casper] is not telling the truth. [Casper] has consistently had to change his testimony, even within the bounds of the same proceeding. Whether or not [Casper's] testimony rises to the level of perjury will be left for another forum. The undersigned is of the opinion that this matter should be referred to the Department of Insurance, Insurance Fraud Investigation Division and the order will so provide. Unfortunately for [Superior], this will not overcome the stipulations of a work-related injury and the medical evidence. [Casper] will be entitled to recovery.

[5] Not surprisingly, Dr. Grenfell was of the opinion that Casper was totally occupationally disabled, while Dr. Haas concluded that Casper did have the capacity to return to the work place and, therefore, was not totally occupationally disabled.

On August 21, 2000, Dr. Gleis performed an independent medical examination of Casper at the request of Superior. At that time, Casper's chief complaint was neck pain. He also complained of right arm, right shoulder, bilateral knee and low back pain. Dr. Gleis assigned a 13% impairment rating for the shoulder, a 15% impairment rating for the cervical spine as a result of the decompression surgery for radiculopathy and 0% impairment for the lumbar spine and bilateral [knee pain]. Using the Combined Values Table, it was Dr. Gleis's opinion that Casper's whole body impairment rating was 26%. While it is clear that Dr. Gleis was unimpressed with Casper's effort on examination, he testified [that] he would apportion 50% of the impairment for both the neck and shoulder to the natural aging process and [one-]half to the 1998 injury.

Dr. O'Brien examined Casper on June 26, 2001. At that time, Casper presented with complaints of right shoulder pain, neck pain and low back pain. Dr. O'Brien diagnosed [a] rotator cuff tear as a result of the October 5, 1998 injury and assigned a 15% impairment rating to the shoulder. In addressing the cervical spine, Dr. O'Brien believed Casper demonstrated age-related degenerative changes that were not dramatic and were the result of the natural aging process. He opined that given the description of the work-related event, the Ainjury did not cause even aggravation beyond normal

progression.@ He further stated that the surgery performed by Dr. Davies, while appropriate, was not [causally] related to the work incident of October 5, 1998. He stated that Casper's cervical spine condition did not require activity restrictions and no further treatment was necessary. Dr. O'Brien, addressing Casper's complaints of low back pain, stated that those complaints were either age-related or related to a prior low back injury in 1996. Dr. O'Brien assessed no impairment rating for the lumbar spine.

On December 3, 2001, the ALJ conducted a benefit review conference. At that time, the parties entered into a number of stipulations including the existence of an employment relationship, coverage, that Casper Asustained a work-related injur(ies) on 10/5/98,@ due and timely notice of the injury, payment of temporary total disability benefits and that Casper does not retain the physical capacity to return to his former work, among others. The only contested issues reserved for determination were the extent and duration of Casper's occupational disability and the effects of the natural aging process.[6]

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[6] As to Superior's argument regarding Casper's alleged failure to follow competent medical advice, the ALJ correctly found that the issue could not be addressed as it had not been reserved for decision. With respect to the contention that Casper failed to prove Athat there was a traumatic event, which was the proximate cause of a harmful change in his human organism,@ the ALJ said: AThe argument hints that the requirement to prove a work[-]related injury has not been met because [Casper's] testimony cannot be believed.@ Although the ALJ agreed with this assertion, he went on to find that Athis ignores the fact that [Superior] has stipulated that a work[-]related injury occurred on October 5, 1998[,] and (continued...)

Following a hearing, the ALJ issued the order which prompted the present appeal, enumerating the stipulations and engaging in a thorough review of the lay and medical testimony of record before finding that Casper's cervical spine condition was not work-related. Finding Dr. O'Brien's opinion Ato be the most credible and convincing evidence in the record@ relating to this condition, the ALJ found that Casper did not suffer an injury to his cervical spine as a result of the work-related incident of October 5, 1998.

Specifically relying on the stipulation in question and the opinions of Dr. Gleis, Dr. O'Brien, Dr. Stodghill and Dr. Davies, the ALJ determined that Casper was not permanently totally occupationally disabled but was entitled to permanent partial disability benefits based on a 13% functional impairment to the body as a whole as a result of the injury to his right shoulder. In so doing, the ALJ observed that Dr. Gleis had conceded that

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[6](...continued)
that Casper does not retain the physical capacity to return to his former work.@ With respect to the related argument that the work-related traumatic event must be the proximate cause of Casper's impaired condition, the ALJ correctly determined that the Board has consistently ruled to the contrary.

Citing Dr. Gleis's opinion, Superior also argued that much of Casper's condition is related to the effects of the natural aging process. Concisely and conclusively rejecting this claim, the ALJ found as follows:

> This ignores Dr. Gleis'[s] concessions, during cross[-] examination, that any pre-existing condition, whether due to the natural aging process or otherwise, would have been a pre-existing dormant condition which was aroused into a disabling reality by the work[-]related event. As [Superior] well knows, the [Board] [has] determined that the amendments to the Workers['] Compensation Act and House Bill 1, while abolishing Special Fund liability, did not abolish recovery for arousal of a pre-existing condition [caused] by a work[-]related event.

Casper's shoulder impairment resulted from the arousal of a preexisting, dormant, non-disabling condition, which, in turn, was caused by the work-related incident. Thus, the condition was fully compensable. Pursuant to Kentucky Revised Statutes (KRS) 342.730(1)(b), the ALJ multiplied his benefit award by a factor of 1.25, resulting in a permanent disability rating of 16.25%, because he does not retain the physical capacity to return to the type of work he was performing at the time of his injury as stipulated by the parties.[7]

In a workers' compensation claim, the claimant bears the burden of proving each of the essential elements of his claim.[8] Where the party that bears the burden of proof before the ALJ is unsuccessful, the question on appeal is whether the evidence compels a different result.[9] Compelling evidence is defined as evidence that is so overwhelming that no reasonable person could reach the same conclusion as the ALJ.[10] It is not enough for the claimant to show there is merely some evidence that would support

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[7] Although Casper moved to strike Superior's brief because it contained arguments relating to uncontested issues, the ALJ declined to do so, finding that the motion Aonce again presume[d] that the undersigned [could] not separate the chafe from the wheat.@ As he was Aable to determine which arguments have relevance and which arguments are totally untenable@ as indicated in his opinion, the ALJ denied the motion.

[8] Snawder v. Stice, Ky. App., 576 S.W.2d 276, 280 (1979).

[9] Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735, 736 (1984).

[10] REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224, 226 (1985).

a contrary conclusion.[11] As long as the ALJ's opinion is supported by any evidence of substance, it cannot be said that the evidence compels a different result.[12]

As fact-finder, the ALJ has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence.[13] Further, the ALJ may choose to believe parts of the evidence and disbelieve other parts, even when it comes from the same witness or the same party's total proof.[14] Accordingly, the Board may not substitute its judgment for that of the ALJ in matters involving the weight to be afforded the evidence on questions of fact.[15] When reviewing the Board's decision, our function is limited to correcting the Board only where we perceive that it has Aoverlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.@[16]

On appeal, Casper frames the sole question presented for our consideration as Awhether the parties and the [ALJ] are bound by a stipulation of a work-related injury, or [] the ALJ is free to disregard such a stipulation and find to the contrary.@

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[11] McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46, 47 (1974).

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

[13] Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985).

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

[15] Ky. Rev. Stat. (KRS) 342.285(2).

[16] Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992).

As we agree with the Board's reasoning as to this dispositive legal issue, we adopt the following portion of its opinion as our own:

> We agree wholeheartedly with Casper that stipulations of fact are an integral part of the workers' compensation decision making process. As pointed out by the [] Supreme Court in Osborne v. Pepsi-Cola Co.[:[17]]
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> > KRS 342.270 encourages stipulation of facts not in dispute to aid in the disposition of workers' compensation claims in a summary and efficient fashion. The regulations of the Workers' Compensation Board infuse stipulations with strength. One may obtain relief from a stipulation only by motion and showing good cause. 803 [Kentucky Administrative Regulations (KAR)] 25:011.[[18]]
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> In Osborne, the issue was whether an overlooked stipulation was reviewable on appeal in the absence of a timely petition for reconsideration. The court determined the ALJ's findings of fact were in contravention of the stipulation, but error was waived by failing to properly and timely object.[[19]] In the instant case, the ALJ clearly did not overlook the stipulation and Casper has at all times properly

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[17] Ky., 816 S.W.2d 643 (1991).

[18] Id. at 644.

[19] Id. at 645.

preserved his argument for appellate review. Further, Superior never properly moved to set aside the stipulation of work-related injuries. Thus, Athe parties and the administrative law judge were bound by the stipulation.@[20]

What both Casper and Superior fail to recognize is that even though the ALJ determined Casper's cervical spine [injury] was not work-related and [that finding] appears inconsistent with the stipulation, the ALJ specifically determined, based on the opinion of Dr. O'Brien, that the entirety of Casper's cervical spine problem was related to the effects of the natural aging process. Natural aging, of course, as pointed out by the ALJ, was a contested issue reserved for determination. Even though the parties stipulated to work-related injuries, it remained the obligation of the ALJ to determine whether that work injury was the event that resulted in the disability, if any. As the [C]ourt stated in Miami Oil Producers, Inc. v. Gillum, Awe conceive that the stipulation settled the question of whether 'the plaintiff sustained an injury,' leaving for consideration by the board only the question of the nature and extent of disability attributable to the injury.@[21]

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20 Id. at 644.

21 Id. at 657. (Emphasis supplied).

Effective December 12, 1996, a harmful change to a worker's body is not compensable if that change is attributable to the natural aging process.[22] In addressing this portion of the statute and the natural aging process in general, our appellate courts have determined that disability resulting from the arousal of a prior dormant condition by a work-related injury remains compensable under the 1996 Act.[23]

Here, the ALJ relied on the report of Dr. O'Brien, which indicated the effects of the work-related event Adid not cause even aggravation or acceleration@ of Casper's pre[-]existing degenerative condition Abeyond normal progression.@ For that reason, the ALJ, in spite of the stipulation of work-relatedness, was free to determine whether the claimed disability was in fact attributable to the injury. Certainly, there was conflicting medical evidence that would have supported a finding that the neck condition was aroused by the October 5, 1998[,] incident and compensable pursuant to the dictates of McNutt and Guffey. Unfortunately for Casper, the ALJ, based on substantial evidence of record, determined the disability claimed was not attributable to the injury. It is not our prerogative to substitute our opinion for that of the ALJ on issues of fact. It is

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22 See KRS 342.0011(1).

23 See McNutt Construction Co. v. Scott, Ky., 40 S.W.3d 854 (2001); Commonwealth of Kentucky, Transportation Cabinet v. Guffey, Ky., 42 S.W.3d 618 (2001).

> axiomatic that the sole authority to judge the weight, credibility, substance and inference to be drawn from the evidence rests solely in the discretion of the fact[-] finder.[24]

As evidenced by his thorough and well-written opinion, the ALJ's decision is supported by both evidence of substance and sound legal reasoning. In affirming that opinion, the Board did not overlook or misconstrue any controlling statutes or precedent or commit any error in assessing the evidence. Rather, the Board properly applied governing legal principles in reaching a result which is dictated not only by binding precedent but logic and fairness. Accordingly, we lack authority to alter the outcome.

The Board's opinion is affirmed.

ALL CONCUR.

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[24] KRS 342.285(10. See Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985).