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# Commonwealth of Kentucky

# Court of Appeals

NO. 2007-CA-000943-WC

CALDWELL TANKS, INC. — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-03-95703

MARCUS WETHINGTON; HON. JOHN B. COLEMAN, ADMINISTRATIVE LAW JUDGE; WORKERS' COMPENSATION BOARD — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND KELLER, JUDGES; GRAVES,[1] SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Caldwell Tanks, Inc., petitions for review from an opinion of the Workers' Compensation Board affirming a determination by the Administrative Law Judge (ALJ) that Marcus Wethington is totally and permanently occupationally

[1] Senior Judge J. William Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

disabled as a result of a work-related injury incurred while in the employ of Caldwell Tanks. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On February 11, 2003, Wethington, while doing welding work as an employee of Caldwell Tanks, fell 117 feet from a water tower to the ground. Wethington sustained multiple injuries as a result of the fall, including a crushed left elbow, broken left femur, broken pelvis, bruised muscle over his right eye, a hernia, and other internal injuries. Wethington underwent multiple surgeries as a result of the injures sustained in the fall, including surgeries to repair his broken bones, removal of a portion of his intestines and implementation of a temporary colostomy bag, and removal of his spleen.

After receiving medical clearance for light duty work, Wethington returned to work for Caldwell Tanks in April 2004 in its Louisville shop operations as a welder. Various extraordinary efforts were made to accommodate Wethington's work restrictions, including limiting his work-week to three days per week; limiting his work-day hours as necessary; providing him a reclining chair for as-needed work breaks; and situating his work station near a restroom to accommodate his need for frequent restroom breaks (required as a result of his intestinal injuries and surgeries).

On January 27, 2006, Wethington filed a claim for workers' compensation benefits. A final hearing was held on on June 26, 2006. On August 7, 2007, the ALJ entered an opinion and award determining that Wethington was permanently and totally

disabled and, though he remained in the employ of Caldwell Tanks on a part-time basis, was entitled to immediate total and permanent disability benefits.

On August 21, 2006, Caldwell Tanks filed a petition for reconsideration wherein it stated "[w]e do not ask the ALJ to reconsider his finding that Plaintiff is permanently and totally disabled. However, we submit that the award of those benefits must be abated until such time as Plaintiff ceases active gainful employment. *Smith v. Leeco, Inc.*, Ky. 897 S.W.2d 581 (1995)." On September 6, 2006, the ALJ issued an order denying the motion.

Caldwell Tanks subsequently appealed the ALJ's decision to the Board. On April 6, 2007, the Board entered an order affirming the ALJ's decision. This petition for review followed.

## STANDARD OF REVIEW

We begin by noting our standard of review. First, we give broad deference to the ALJ's factual findings. "The ALJ, as the finder of fact, and not the reviewing court, has the sole authority to determine the quality, character, and substance of the evidence." *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997). The ALJ, as fact-finder, 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 adversary party's total proof. *Magic Coal v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). Mere evidence

contrary to the ALJ's decision is not adequate to require reversal on appeal. *Whittaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999). And, as always, our review of questions of law is de novo. *Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth, Transportation Cabinet*, 983 S.W.2d 488, 490 (Ky. 1998)

Our function in reviewing the Board's decision "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." *Western Baptist Hospital v. Kell*y, 827 S.W.2d 685, 687-88 (Ky. 1992).

FINDING OF TOTAL DISABILITY

Caldwell Tanks contends that Wethington is not permanently and totally disabled. In support of this argument, Caldwell Tanks alleges that "Mr. Wethington's vocational status does not conform to the definition of permanent total disability, because he is performing a service for remuneration of a regular and sustained basis, and his services are not so limited as to classify him as totally disabled. Currently, as he has been for nearly three years, Mr. Wethington works as a shop welder for Caldwell Tanks. His job duties include manual labor such as assembling parts and light welding. . . . It is undisputed that Mr. Wethington is engaged in remunerative activity and has sustained that activity for three years."

As previously noted, following the issuance of the ALJ's opinion and award on August 7, 2006, on August 21, 2006, Caldwell Tanks filed a petition for

reconsideration wherein it stated "[w]e do not ask the ALJ to reconsider his finding that Plaintiff is permanently and totally disabled. However, we submit that the award of those benefits must be abated until such time as Plaintiff ceases active gainful employment. *Smith v. Leeco, Inc.*, Ky. 897 S.W.2d 581 (1995)."

A petition for reconsideration must be filed with the ALJ in order to preserve an issue in a workers' compensation proceeding for appellate review. *Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327, 330 (Ky.App. 2000). In its August 27, 2006, petition for rehearing, not only did Caldwell Tanks not file a petition for rehearing upon the issue of the ALJ's finding that Wethington was totally and permanently disabled, it specifically disclaimed that it was seeking reconsideration on the issue. As such, this argument is not preserved for appellate review.

FINDING OF DISABILITY UNDER GUNDERSON

Caldwell Tanks' second argument - that the ALJ misapplied the holding in *Gunderson v. City of Ashland*, 701 S.W.2d 135 (Ky. 1985) - overlaps with both the preceding argument and the following argument. *Gunderson* held, as relevant to this argument, that under certain circumstances an employee could be determined to be totally and permanently disabled (and entitled to immediate benefits) even though he continued to work in gainful employment.

As previously noted, Wethington remains gainfully employed, but was nevertheless determined by the ALJ to be totally and permanently disabled. The ALJ specifically relied upon *Gunderson* in reaching its disability determination.

Caldwell Tanks frames this argument as a challenge to the ALJ's determination that Wethington is totally and permanently occupationally disabled. As previously noted, however, Caldwell Tanks failed to preserve this argument by moving for reconsideration of the ALJ's determination on the issue. *Halls Hardwood Floor*, 16 S.W.3d at 330. As such, again, no matter how couched, the issue of whether Wethington is totally and permanently occupationally disabled is not preserved for appellate review. *Id.* However, we further consider *Gunderson* in our discussion below

ABEYANCE UNDER SMITH V. LEECO

Caldwell Tank's final argument is that because Wethington continues to work in the company's employ, his entitlement to draw benefits should be held in abeyance until he ceases his employment, or else it should receive credit on the disability benefits obligation for any amounts paid out to Wethington in wages. In support of its position Caldwell Tank's relies upon *Smith v. Leeco*, 897 S.W.2d 581 (Ky. 1995).

In *Smith*, the claimant was determined to have category 2 pneumoconiosis, which, in the normal course of events, would have resulted in an irrebuttable presumption that the employee was totally disabled. *Id.* at 582. However, the claimant suffered from no pulmonary impairment and, in fact, continued to work for the company as a coal miner. The pneumoconiosis statutes provided that "that compensation payments shall commence on the date of the employee's last injurious exposure or the date of actual disability, whichever is later." *Id.* Because of this limitation on when payments could

commence, the Court concluded "[c]laimant is still being injuriously exposed to the hazards of the disease; therefore it would be impossible to begin payments."

We believe that Smith is distinguishable because its focus was an interpretation of the separate and unique pneumoconiosis provisions of Chapter 342 - statutes not at issue here.

Ultimately, we believe that *Gunderson* is the controlling case. In *Gunderson*, an Ashland police officer, was shot in the line of duty and rendered a quadriplegic. Though by any measure totally and permanently occupationally disabled, the dispatcher office, with the assistance of governmental grants, was outfitted for the claimants handicap and he was able to continue working in the area of law enforcement as a police dispatcher. *Gunderson* held that even though the claimant continued to work, the fact-finder properly determined that he was totally and permanently occupationally disabled and entitled to draw immediate benefits. Quoting *Osborne v. Johnson*, 432 S.W.2d 800 (Ky. 1968), the *Gunderson* decision reasoned as follows:

> the determination of a claimant's post-injury earning capacity is based on normal employment conditions:
>
> ... the essence of the test is the probable dependability with which the claimant can sell his services in a competitive labor market, undistorted by such factors as business boom, *sympathy of a particular employer* or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps. Larson's, Workers' Compensation, Vol. II, § 57.51. (Emphasis in original).

The ALJ specifically found that Caldwell Tanks is a sympathetic employer, ALJ Opinion and Award pg. 13, and Caldwell Tanks essentially admits to this, Appellant Brief, pg. 10. Thus we believe this case lies within the scope of *Gunderson*.

Caldwell Tanks argues, however, that Gunderson's precedential value is limited because a previous definition of permanent total disability was then in effect.

The disability standard applied in *Gunderson* was "the loss of ability to *compete to obtain* the kind of work [the claimant] is customarily able to do in the area where he lives." 701 S.W.2d at 137. (Emphasis added). Today, the standard is "'Permanent total disability' means the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury[.]" KRS 342.0011(11)(b). Work, in turn, is defined as "providing services to another in return for remuneration on a regular and sustained basis in a *competitive economy*[.]" KRS 342.0011(34). (Emphasis added). Hence, formerly the definitional statutes spoke in terms of "compete to obtain work," and today speak in terms of "providing services in a competitive economy." We discern little difference in the overall gist of the statutes, and believe *Gunderson* remains the controlling law in this area.

Caldwell Tanks further argues that Gunderson is distinguishable because the claimant in that case was much more severely injured than in the present case and, further, required significantly more accommodation. We agree that Kevin Gunderson was more severely injured than Marcus Wethington and required greater

accommodations to allow him to continue to work; however, we again note that our function in reviewing the Board's decision "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." *Western Baptist Hospital v. Kell*y, 827 S.W.2d 685, 687-88 (Ky. 1992). With this standard in mind, we note that the Board addressed the issue as follows:

> Here, Wethington was found totally occupationally disabled yet due to sympathetic treatment by his employer, earned part time wages that approached his weekly award for total disability. Nonetheless, as the court has stated, the fact that a claimant has the ability to perform part-time work does not necessarily preclude a finding of total disability Nonetheless, as the court has stated, the fact that a claimant has the ability to perform part-time work does not necessarily preclude a finding of total disability. *R.C. Durr, Co., Inc. v. Chapman, [563 S.W.2d 743 (Ky.App. 1978)]*.
>
> The underpinning of the ALJ's award was that a work-related injury rendered Wethington completely and permanently unable to work. The services Wethington provides to Caldwell is part-time and is unavailable to Wethington on a regular and sustained basis. This is not a situation where there has been a return to regular "work" or a situation involving only permanent, partial disability. This distinction is important because as stated in *Yocom [v. Yates, 566 S.W.2d 796 (Ky.App. 1978)]*:
>
> > [T]he board and courts should look to the impairment of the injured workmen's ability to do some gainful work in the future or, putting it another way, his over-all earning capacity as viewed in terms of future prospects. This is the guidepost in spite of the fact that the usual work may be continued. In the litigation at bar, not only are the wages decreased but also the job is part time. The condition is permanent and total

> and will progressively deteriorate. (Citation omitted.) We are not prepared to tax the appellee for his efforts to sustain his family.

Id. at 798.

> Here, unlike the workers in *Smith v. Leeco* and *Whittaker v. Skagges* [Workers' Compensation Board Claim Nos. 91-06845 and 87-08713, rendered February 13, 2002], who were able to return to regular full-time employment, Wethington is not so fortunate. Though the result, admittedly, appears unfair to Caldwell, there is no statutory basis to support its argument and the current case law provides no clear authority to justify the equitable relief it seeks. In sum, we believe the ALJ's decision must be affirmed, and if the Board has erred, we err in favor of the severely injured worker.

We do not perceive that 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. As such, we will not disturb its decision to affirm the determination of the ALJ. *Western Baptist Hospital v. Kelly*, *supra.*

CONCLUSION

For the foregoing reasons the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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