

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 17, 2014

CLAIM NO. 201092632

MACHINERY SALES & SERVICES

PETITIONER

VS.

APPEAL FROM HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE

JOSEPH LAYNE
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

ALVEY, Chairman. Machinery Sales & Service ("Machinery Sales") seeks review of the opinion, award and order rendered July 31, 2013 by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ") awarding Joseph Layne's ("Layne") benefits enhanced by the two multiplier pursuant to KRS 342.730(1)(c)2 after finding he was terminated from

employment due to the effects of his work injury. It also seeks review of the September 9, 2013 order denying its petition for reconsideration. The sole issue on appeal is whether the ALJ erred in finding Layne's termination due to his work-related injury.

Layne filed a Form 101 on November 7, 2011 alleging he injured his low back, left hip and left leg on March 22, 2010 when he took a piece of metal off a saw and turned his body. Layne had been employed as a welder/fabricator by Machinery Sales since August. The parties ultimately settled Layne's claim, which was approved by Hon. Joseph W. Justice, Administrative Law Judge, on March 27, 2012. The settlement agreement reflects a diagnosis of lumbar sprain/strain with radiculitis for which no surgery was required. The agreement reflects Layne earned an average weekly wage of \$1,000.77 at the time of injury. It also indicates Layne returned to his pre-injury position as a welder/fabricator on April 14, 2010 earning the same rate of pay. Using the 10% impairment rating assessed by Dr. Harry Bell with no application of a multiplier, the parties agreed Layne would receive \$45.38 per week for 425 weeks beginning on April 14, 2010 with no waivers.

Approximately three weeks following the settlement, Layne filed a motion to reopen alleging he had

been recently terminated as a result of his work injury. Layne submitted two affidavits supporting his motion. In one affidavit dated April 12, 2012, Layne stated he was laid off on April 6, 2012 by Jill Nolan ("Nolan") and Jeff Muncy ("Muncy"), who informed him things were tight at the company. They stated Layne was an excellent employee with no performance complaints, and the layoff was random and not due to his workers' compensation claim. In an affidavit dated June 20, 2012, Layne stated he was terminated after he had settled his workers' compensation claim. He alleged his termination was due to his work injury and receipt of workers' compensation benefits. He also stated he recently began working for a different employer, earning less money than he earned while with Machinery Sales. Therefore, pursuant to KRS 342.730(1)(c)2 and Chrysalis House v. Tackett, 283 S.W.3d 671 (Ky. 2009), Layne requested his benefits be doubled. Layne's motion to reopen was sustained and the claim was eventually assigned to the ALJ.

The evidence of record consists of Layne's testimony and Nolan, the human resource manager for Machinery Sales. Layne testified by deposition on September 17, 2012 and at the hearing held March 25, 2013. Layne began working for Machinery Sales in August 2000 as a welder/fabricator and continued to do so for twelve years

before his termination on April 6, 2012. Machinery Sales has two locations, one in Ashland, Kentucky and one in Hazard, Kentucky. Layne worked at the Ashland shop where he serviced and repaired equipment, and also built new fuel trucks. He described his occupation as highly skilled and his job with Machinery Sales as specialized. At the time of his March 22, 2010 work injury, Layne regularly worked fifty hours per week and was the second most senior employee in the Ashland shop.

On March 22, 2010, Layne felt a pull in his low back when taking a large piece of metal off of a saw. Layne sustained a herniated disc with radiculopathy and has received treatment from several physicians, although his condition has not required surgery. Layne missed approximately three weeks of work before returning to his regular position as a welder/fabricator earning the same rate of pay, despite experiencing continued symptoms in his low back and left leg. Layne continued to work for Machinery Sales until his termination in April 2012. Layne stated he was able to perform his job duties, albeit at a different pace. When Layne first returned to work his boss had told him "he didn't care if he was in a wheelchair that he needed me there and just to take my time and not hurt myself." Following his return to work, Layne indicated

Machinery Sales grew tired of the length of his treatment for his work injury.

Layne testified over the course of his employment with Machinery Sales, he regularly worked five, ten hour shifts per week. However, approximately two months prior to his termination, "they had dropped back to forty hours a week." Layne stated the reduction of hours applied to "the whole shop" but did not know why Machinery Sales cut back the hours. On at least one prior occasion in 2011, Machinery Sales had reduced employee hours for approximately two days. However, Layne testified he did not have an understanding of Machinery Sales revenue or sales, nor did he know how many people the company employed.

Layne confirmed he settled his claim with Machinery Sales on March 27, 2012. Ten days later on April 6, 2012, he was laid off following the end of his shift by Muncy, part owner of Machinery Sales, and Nolan. Layne stated Nolan and Muncy told him "the work was tight, everything was tight in the shops, so I took it as money wise. And they was[sic] going to have to let people go and said that I was one of them." Layne stated he specifically asked if his work or attendance was unsatisfactory, in which Nolan and Muncy replied no, "you are an excellent employee." Layne then asked if the layoff was "just a random thing" and

Muncy replied "that's what it is, it's random." At the time of his termination, Layne was earning \$21.00 per hour, working approximately forty hours a week. He also indicated work was steady prior to his termination, and he was not laid off due to misconduct or poor job performance. Layne testified he believes he was laid off due to his work-related injury and disagrees with the reasoning provided by Machinery Sales.

At the time of his termination, the Ashland location had approximately twenty employees. Layne was aware of only one other employee who was terminated at the Ashland location around the same time he was. That person was a mechanic's helper who had only worked for Machinery Sales for two months. He was aware other employees were laid off at the Hazard shop, but did not know how many. On cross-examination, Layne admitted he was aware Machinery Sales had lost business from Pompey Coal just before he was laid off. However, he alleged Machinery Sales hired another welder/fabricator shortly after he was laid off to perform his prior job. At the hearing, Layne introduced a notarized statement dated November 26, 2012 indicating Machinery Sales had hired another welder in his position on October 29, 2012 and questioned why he was not recalled if his layoff was truly due to a lack of work.

Layne testified he collected unemployment benefits for several weeks until he got a job as welder at a fabrication shop, EMS Group, at the end of May 2012. He continues to work at EMS Group earning approximately half of what he earned at Machinery Sales at the time of his work injury. Layne testified his symptoms have worsened because he now works with heavier components.

Layne also testified he authorized his attorney to send Machinery Sales a letter on April 9, 2012 requesting a written explanation for his termination. This letter was attached as an exhibit. Neither Layne nor his counsel received a response. Layne also filed a civil suit against Machinery Sales alleging a violation of KRS 342.197 which was settled by the employer.

Nolan, the human resources manager for Machinery Sales since 2006, testified by deposition on October 10, 2012. Nolan is responsible for entering new hires into the system and handles all workers' compensation claims. Nolan stated Machinery Sales sells, leases and repairs heavy equipment and deals mostly with coal mine sites. Nolan confirmed Layne was a welder for Machinery Sales. At the time of the deposition, Nolan stated Machinery Sales had seventy-one employees. However, they had laid off approximately ten people since January 2012. Nolan

testified as follows regarding why Machinery Sales laid off employees during this time:

A: Because of the coal market mainly. We had six of our biggest customers - - three of them we've lost, you know, coal mines have shut down, so we lose the work. And we have been kind of going through this before January even and tried to cut benefits in different areas to keep from laying people off, but once we lost those three the first of the quarter, we just had no other alternative but do to do layoffs.

Q: And you said "the first of the quarter," did you mean the first quarter?

A: Yes.

Q: So back in January.

A: Yes.

Q: Okay. So, from what you're explaining to me I guess laying off was kind of the last resort?

A: Right.

Q: And you had taken other measures before that.

A: Yes. It was not nothing done lightly. It's not something we even do that often is lay off . . .

Attached as an exhibit was a document tracking all Machinery Sales' employees who had been laid off or had resigned since 2012. The document indicates five employees were laid off on April 2, 2012, three on April 6, 2012

(including Layne), and two in August 2012. Of the ten employees laid off, four were welders, two were mechanics, two were greasers, one was a mechanic's helper and the other was a parts runner. Layne testified a total of eight employees were laid off in April 2012 when Pompey Coal shut down their mines.

Also attached as an exhibit is a list of all workers' compensation claims from 2010 to 2012 at Machinery Sales, the employee's date of accident, status and termination date. The list indicates there were fourteen workers' compensation claims by Machinery Sales employees from 2010 to 2012. Of these claimants, one was fired in February 2010, three quit, nine remain employed and one (Layne) was laid off.

Nolan testified she was not involved in deciding which employees to lay off. To her knowledge, all employees were let go due to economic reasons and she was not aware of any job performance issues with Layne. Nolan stated Layne, as well as another welder at the Hazard shop, was let go around the same time. She also stated other employees who had been with Machinery Sales longer than Layne had also been let go. However, she was unsure of the exact number of employees from the Ashland shop who were laid off around the same time as Layne and did not have any information

regarding the Ashland shop's income or work orders in 2011 or 2012.

Nolan acknowledged Machinery Sales had received a letter from Layne's attorney requesting a written explanation. When questioned why it did not respond, Nolan stated, "I was just told to file it and not respond." Since April 2012, Machinery Sales has hired a guard at the Ashland location. Nolan denied the company has since hired another welder at either the Ashland or Hazard location.

In the July 31, 2013 opinion, award and order, the ALJ provided the following analysis:

In order to qualify for the 2x multiplier, the Plaintiff must show that his employment ceased due to his work injury. KRS 342.730(1)(c)2 indicates that a worker who returns to work at the same or greater wage qualifies for the 1 x multiplier. (KRS 342.730(1)(c)2) If that worker later ceases employment, he may be entitled to the 2x multiplier. The determining factor as to whether that employee qualifies for the 2x multiplier is whether the cessation of work was due to the work injury.

KRS 342.730(1)(c)(2) appears at first blush to provide clearly and unambiguously for a double benefit during a period of cessation of employment at the same or a greater wage "for any reason, with or without cause." It is, however, a subsection of KRS 342.730(1), which

authorizes income benefits to be awarded for "disability" that results from a work-related injury. We conclude for that reason that, when read in context, KRS 342.730(1)(c)(2) permits a double income benefit during any period that employment at the same or a greater wage ceases "for any reason, with or without cause," provided that the reason relates to the disabling injury. (*Chrysalis House, Inc. v Tackett*, 283 S.W.3d 671, (Ky. 2009))

We determined in *Chrysalis House* that subsection (c)2 of KRS 342.730(1) is unambiguous but must be considered in the context of the entire provision, which authorizes benefits for "disability" that results from a work-related injury. Having considered the subsection in context, we concluded that it permits double benefits during a cessation of employment at the same or a greater wage "for any reason with or without cause" that relates to the disabling injury. We complied with the rules of statutory construction when doing so. (See *Combs v. Hubb Coal Corp.*, 934 S.W.2d 250, 252- 53, 43 12 Ky. L. Summary 8 (Ky. 1996); *Manies v. Croan*, 977 S.W.2d 22, 23, 45 13 Ky. L. Summary 1 (Ky. App. 1998)) (*Crotzer v. CWI*, 2011 Ky. Unpub. LEXIS 11, 3-4 (Ky. Mar. 24, 2011))

According to *Chrysalis House* and its

progeny, if the Plaintiff's cessation of work was due to his original work injury, he is entitled to the 2x multiplier per KRS 342.730. Thus, the applicable standard.

The Plaintiff moved for this reopening and therefore has the burden of proof in showing that he was laid off for reasons associated with his work injury.

That the burden is upon the one moving for a reopening of a compensation award . . . is thoroughly settled by this court's opinions cited in annotations to section 342.125 in the volume of Notes to KRS, beginning on page 1156, some of which are: *Standard Accident Insurance Co. v. Hinson*, 251 Ky. 287, 64 S. W. 2d 574; *University of Kentucky v. Combs*, 261 Ky. 833, 88 S. W. 2d 981, and *Department of Highways v. Harrell*, 291 Ky. 90, 163 S. W. 2d 287. (*W. E. Caldwell Co. v. Borders*, 301 Ky. 843, 847 (Ky. 1946))

The Plaintiffs[sic] proof consists of his own unsupported testimony. The Plaintiff has stated that "he knows of no legitimate business reason" that his employment ceased. He has also testified that even though no one ever told him he was being let go due to his injury, he surmised that his injury must have something to do with the lay-off. He relies on the circumstances surrounding his lay-off to support his assertion that he was laid off due to the fact that he had filed a workers compensation claim.

The Plaintiff testified that he was terminated on April 6, 2012 following settlement of his workers' compensation claim on March 27, 2012. The Plaintiff testified that his attorney was authorized to send a letter dated April 9, 2012 to the Defendant/Employer requesting written explanation as to the reason for the termination.

No response to that letter was ever received or offered by the Defendant/Employer.

The Plaintiff testified that when he asked for a reason for the layoff he was told that it was "random". The Plaintiff testified that he thought his layoff was suspicious given the fact that he was the second senior man at the Ashland location and had worked there for over 10 years. The Plaintiff testified:

"Q44 Is it your understanding that since that layoff they have hired somebody to do the job you were doing?

A Yes, sir.

Q45 So the reason given was that there was a layoff. Is that correct?

A: Yes.

Q46: Lack of work?

A: Yes.

Q47 But then they have since then hired somebody back to do your job?

A: Yes." (T.R. pp. 12-13)

The Plaintiff further provided affidavits which explained his understanding of the circumstances surrounding his layoff. (T.R. Layne Ex. 2-3).

Jill Nolan, human resources manager for Machinery Sales, testified that the Plaintiff was laid off by Machinery Sales along with other employees during a downturn in business. Eight people were laid off on the same day as the Plaintiff. The Plaintiff was one of two welders who were let go on the same day. Eleven employees were laid off from January thru April 2012. Jill Nolan further testified that no one was hired to fill the Plaintiff's position. She also indicated that Machinery Sales had lost 3 of its 6 biggest customers, including Pompey Coal, due to a slow-down in coal mining.

At the Final Hearing, the Plaintiff testified that he knew nothing about the financial inner workings of Machinery Sales. He also testified that he was aware that Machinery Sales had lost some business and that work had slowed down. The Plaintiff also testified that he had been told that he was a good employee.

Exhibits attached to the deposition of Jill Nolan list the names of employees laid off in 2012 and the names of employees that filed a workers comp claim between 2010 and 2012. The documents were produced and are maintained by Jill Nolan in her capacity as human resources manager for Machinery Sales and were attached as exhibits to aid in the understanding of her testimony. Based on the testimony of Ms. Nolan, the Plaintiff is the only person whose name appears on both lists.

Ms. Nolan testified that the Plaintiff was not the only employee at Machinery Sales who had filed a workers' comp claim. Ms. Nolan also testified that the list of names of employees that filed a workers' comp claim between 2010 and 2012 was compiled by her in her capacity as human resources manager for Machinery Sales. She indicated that the list states "active" beside the names of employees who still work for Machinery Sales. Of the 15 names on the list, 9 state the status as "active." Only one name on the list, that of the Plaintiff, states a status of "laid off."

The Plaintiff's evidence consists of his own testimony which is based on his own supposition and is unsupported by any other evidence. The testimony of Jill Nolan - that Machinery Sales lost customers and had to lay off several people as a result - is not disputed. Yet the Defendant employers[sic] record is suspect. Ms. Nolan testified that she was instructed to deny Plaintiff the simple courtesy of an explanation as to why he had been laid off. It is also not disputed that the Plaintiff was one of those employees who was laid off during the company's financial down-turn, but there is no explanation as to why an employee with the seniority of Plaintiff and the technical skills that are so valuable to the employer would be laid off ahead of other employees. While there is no direct evidence that shows that the Plaintiff was laid off due to his work injury, there is evidence that there was no other legitimate reason presented as to why he had been chosen. Therefore, the Plaintiff has met his burden of proof.

As a result, the ALJ found Layne had shown by a preponderance of the evidence that he was let go due to his work injury and is entitled to a doubling of his benefits per KRS 342.730(1)(c)2 at a rate of \$90.75 per week "from the date his employment ended for the remainder of the original 425 week period."

Machinery Sales filed a petition for reconsideration noting it had produced both testimony and documentation demonstrating Layne was laid off during an economic downturn. Machinery Sales argued the question is not why a senior employee was laid off, but whether he was laid off due to his work injury. It argued the ALJ erred in deciding in favor of Layne in absence of direct evidence. Machinery Sales' petition was denied on September 9, 2013 as a re-argument of the merits of the claim. The ALJ stated, "I simply believed that the Plaintiff's evidence as to the true reason for his termination was more compelling and persuasive than that of the Defendant employer."

On appeal, Machinery Sales argues the ALJ erred in finding Layne was laid off due to his work injuries pursuant to KRS 342.730(1)(c)(2) and Chrysalis House, supra. It argues Layne's entire proof consists of his own testimony which is unsupported by any other evidence. It

also directs our attention to the testimony of Nolan, and the business records attached as exhibits during her deposition. Machinery Sales argues Nolan's testimony and the business records show eight other people were laid off around the same time as Layne. It notes Layne and another welder were laid off the same day. A total of eleven employees were laid off from January 2012 through April 2012. Machinery Sales also argues Nolan testified no one was hired to fill Layne's position and it had lost three of its six biggest customers, including Pompey Coal, due to a slow-down in the coal mining industry. It also argues the exhibits demonstrate Layne was the only employee who had previously filed a workers' compensation claim and subsequently got laid off. Nine other employees who had previously filed workers compensation claims are still active employees with Machinery Sales. It further notes Layne was unable to provide any evidence outside of his own testimony establishing he was let go due to his work injury. Again, Machinery Sales asserts the question on appeal is not why a senior employee was laid off, but whether Layne was laid off because of his work injury.

As noted by the ALJ, it is well settled Layne, as the party moving for a reopening, bears the burden of proving he is entitled to the application of the two

multiplier. See W.E. Caldwell Co. v. Borders, 193 S.W.2d 453 (Ky. 1946). Since Layne was successful before the ALJ, the question on appeal is whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The 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 adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be

shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

KRS 342.730(1)(c)2 states 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 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 Chrysalis House, Inc. v. Tackett, 283 S.W.3d at 674, the Kentucky Supreme Court narrowed the applicability of KRS 342.730(1)(c)2, holding as follows:

KRS 342.730(1)(c)2 appears at first blush to provide clearly and unambiguously for a double benefit during a period of cessation of employment at the same or a greater wage 'for any reason, with or without cause.' It is, however, a subsection of KRS 342.730(1), which authorizes income benefits to be awarded for 'disability' that results from a work-related injury. We conclude for that reason that, when read in context, KRS

342.730(1)(c)2 permits a double income benefit during any period that employment at the same or a greater wage ceases 'for any reason, with or without cause,' **provided that the reason relates to the disabling injury.** See also Hogston v. Bell South Telecommunication, 325 S.W.3d 314 (Ky. 2010). (emphasis added)

In this instance, the proof of record consists solely of Layne's testimony and his supporting affidavits versus Nolan's testimony and her business records. After engaging in a thorough review of the evidence, and noting the correct analysis required in determining the application of the two multiplier upon reopening, the ALJ found the testimony of Nolan and her supporting records suspect. In support of his finding, the ALJ noted Nolan was instructed to deny Layne "the simple courtesy of an explanation as to why he had been laid off" and also noted there was no explanation as to why "an employee with the seniority of Plaintiff and the technical skills that are so valuable to the employer would be laid off ahead of other employees." In the order denying Machinery Sales' petition for reconsideration, the ALJ reiterated he "simply believed that the Plaintiff's evidence as to the true reason for his termination was more compelling and persuasive than that of the Defendant employer."

While we agree with Machinery Sales there is conflicting evidence in the record supporting its position Layne's termination was due to an economic downturn, such is not enough to require a reversal on appeal. As noted above, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, supra. An ALJ has an inherent right and obligation to draw inferences from the evidence. It is clear from his opinion and order on reconsideration, the ALJ found Nolan not to be a credible witness and further found the business records suspect. The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). The ALJ simply chose to find the testimony of Layne more persuasive than that of Nolan. Machinery Sales is attempting to reargue the merits, and asks this Board to re-weigh the evidence and reach a conclusion contrary to that of the ALJ. The Board has no such authority.

Accordingly, the July 31, 2013 opinion, award and order and the September 9, 2013 order on reconsideration

rendered by Hon. Steven G. Bolton, Administrative Law Judge,
are hereby **AFFIRMED**.

ALL CONCUR.

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