

Commonwealth Of Kentucky

Court Of Appeals

No. 1998-CA-000328-WC

ARCH OF KENTUCKY, INC.

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-09042

JAMES SERGENT; SPECIAL FUND;
HON. SHEILA C. LOWTHER,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING
AND
ORDER DENYING MOTION FOR ORAL ARGUMENT

** ** * * *

BEFORE: KNOX, MILLER, and SCHRODER, Judges.

MILLER, JUDGE. Arch of Kentucky, Inc. (Arch), asks us to review a January 16, 1998 opinion of the Workers' Compensation Board (board). Ky. Rev. Stat. (KRS) 342.290. We affirm.

Appellee, James Sergent (Sergent), has filed a Motion for Oral Argument which was passed to this panel by Order of the Court dated April 7, 1998. Having considered the motion, same is DENIED.

On December 12, 1995, James Sergent (Sergent) suffered a work-related injury to his lower back while employed as an underground coal miner at Arch. He continued to work for Arch until May 20, 1996, but has not worked since that date. Prior to

that time, Sergeant sought medical treatment and went to physical therapy for his injury. A microdiskectomy was performed on his back in June 1996. Sergeant filed a claim for workers' compensation benefits, and in an opinion dated August 29, 1997, the administrative law judge (ALJ) found Sergeant to be 100% occupationally disabled. The ALJ then utilized the calculation formulated in KRS 342.730(1)(a) to determine Sergeant's award. Arch appealed to the board, which, in turn, affirmed the decision of the ALJ. This appeal followed.

The sole issue on appeal is whether it was error not to apply the limitations contained in KRS 342.730(1)(b) when computing Sergeant's income benefits. KRS 342.730(1)(a) and (b) read in relevant part as follows:

(1) Except as provided in KRS 342.732, income benefits for disability shall be paid to the employee as follows:

(a) For total disability due to a work-related injury or occupational disease, sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than one hundred percent (100%) of the state average weekly wage and not less than twenty percent (20%) of the state average weekly wage as determined in KRS 342.740 during that disability

(b) For permanent, partial disability, where an employee returns to work at a wage equal to or greater than the employee's preinjury wage, sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740 multiplied by his percentage of impairment caused by the injury or occupational disease as determined by "Guides to the Evaluation of Permanent Impairment," American Medical Association, latest edition available, unless the employee establishes a greater percentage of

disability as determined under KRS 342.0011(11), in which event the benefits shall not exceed two (2) times the functional impairment rate, for a maximum period, from the date the disability arises, of four hundred twenty-five (425) weeks subject to the provisions of subsection (1)(d) of this section. . . .

Arch advances the theory that KRS 342.730(b) sets out the requirements for finding an employee permanently partially disabled. It argues that because Sergent returned to work after his injury, at a wage "equal to or greater than [his] preinjury wage," he is entitled, pursuant to KRS 342.730(b) to only "two times the impairment found by the medical evidence presented." We disagree and believe Arch misinterprets KRS 342.730(1)(b). Arch advances the theory that KRS 342.730(b) sets out the requirements for finding an employee permanently partially disabled. KRS 342.730 merely sets forth the method of calculating benefits once the employees' percentage of disability has already been adjudged.¹ Cf. Fleming v. Windchy, Ky., 953 S.W.2d 604 (1997), Spurlin v. Brooks, Ky., 952 S.W.2d 687 (1997). As Sergent was found to be totally disabled, the correct calculation was used to determine his award.

Further, it is our opinion that the ALJ's finding that Sergent was 100% occupationally disabled is based on substantial evidence. See Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). Sergent is 38 years old with only a high school degree. He has performed only manual labor throughout his

¹Arch's interpretation of Ky. Rev. Stat. 342.730(1)(b) would discourage claimants from making any attempt to return to work following an injury, a result contrary to the purpose of the Workers' Compensation Act.

life and possesses no specialized training. Dr. Phillip Tibbs, a neurosurgeon who treated Sergeant, testified that Sergeant could not return to the type of work he was performing at Arch prior to his accident. Sergeant also testified that he would be unable to perform such duties. As such, we believe the ALJ committed no error in his finding of disability or in his calculation of an award.

Under the precepts of Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992), we hold the board committed no error construing the law or assessing the evidence.

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

ALL CONCUR.

/s/ John D. Miller
JUDGE, COURT OF APPEALS

ENTERED: October 30, 1998

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