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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 1997-CA-000818-WC

LEECO, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 94-038757

JIMMY MITCHELL; HON. ROBERT SPURLIN,
ACTING DIRECTOR OF SPECIAL FUND;
HON. THOMAS A. DOCKTER,
ADMINISTRATIVE LAW JUDGE; AND APPELLEES
WORKERS' COMPENSATION BOARD

OPINION
AFFIRMING IN PART, REVERSING IN PART AND REMANDING
** ** ** ** **

BEFORE: GARDNER, JOHNSON AND MILLER, JUDGES.

JOHNSON, JUDGE: Leeco, Inc. (Leeco) petitions this Court for review of a February 28, 1997 opinion of the Workers' Compensation Board (Board) which affirmed the Administrative Law Judge's (ALJ) order wherein the ALJ found Jimmy Mitchell (Mitchell) to be permanently totally disabled and apportioned 40% of the liability to Leeco. The ALJ found that the degree of prior active occupational disability which existed immediately prior to the subject injury was 20% and that the Special Fund was liable for the remaining 40% of the total disability as the

result of previously dormant underlying conditions being aroused into a state of disabling reality. Leeco raises three issues in its petition: (1) whether the ALJ based his opinion upon an incorrect interpretation of the evidence; (2) whether a work-related prior active disability can be used to increase a partial disability award to a total disability award; and (3) whether the Supreme Court should overrule this Court's decision in Southern v. R.B. Coal Company, Ky.App., 923 S.W.2d 902 (1996), regarding which party receives the benefits of the "tier down" provisions. Since the Supreme Court has overruled Southern, supra, we must reverse the Board on this issue and remand for further proceedings. We affirm on the other two issues.

Mitchell, who was born on November 20, 1953, sustained a work injury on September 1, 1994, while working as a coal miner for Leeco. Mitchell testified that he felt a tearing sensation in his back and pain when he was suddenly jerked while working on a belt line.[1] Following a period of conservative treatment, Mitchell had surgery performed on his back by Dr. Phillip Tibbs (Dr. Tibbs), a neurosurgeon. Mitchell continued to experience severe problems after the surgery, i.e., difficulty sitting, standing, walking, bending and lifting. As a result of his condition, Mitchell also developed psychological problems which required treatment.

In support of his claim, Mitchell presented the testimony of his treating physician, Dr. James Templin (Dr.

[1] Mitchell sustained work-related injuries to his back in 1989 and 1991, but did not file a claim for those injuries. He was off work several months with each injury.

Templin), who was an occupational medicine specialist.[2] While Dr. Templin referred Mitchell to Dr. Tibbs for surgery, Dr. Templin continued as Mitchell's treating physician after the surgery. Dr. Templin expressed the opinion that Mitchell was unable to do any activity which involved lifting, pushing, pulling, twisting, turning, carrying or any extensive walking, bending, stooping or kneeling. He also restricted Mitchell from riding on vibratory vehicles. Dr. Templin restricted Mitchell to a ten-pound limitation on repetitive lifting or carrying and assessed him with a 15-19% functional impairment. Dr. Templin opined that Mitchell was totally disabled as far as his ability to return to work or perform manual labor.

Dr. Tibbs assessed a 14% functional impairment to Mitchell's body as a whole and restricted Mitchell to lifting no more than ten pounds on a frequent or an occasional basis and no more than thirty pounds at any one time. He also imposed the restrictions of not standing or walking for more than six hours, only occasional climbing, stooping, kneeling, crouching, and bending and never crawling.

Dr. Daniel Primm (Dr. Primm), an orthopedic surgeon, also examined Mitchell at Leeco's request and assessed a 15% functional impairment. He apportioned the disability rating to include a pre-existing active component that dated back to Mitchell's injury of 1989 and the re-injury of 1991.

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[2] Mitchell saw Dr. Templin for treatment at the request of Leeco.

Dr. Robert Granacher (Dr. Granacher), a psychiatrist, examined Mitchell and stated that Mitchell read on a second grade level and that he suffered from major depression. He rated Mitchell as suffering a 10% functional impairment, one-half of which was due to his depression. Dr. Sheila Dietrich (Dr. Dietrich), a psychologist, examined Mitchell and opined that he read on a third grade level and suffered from major depression and anxiety. She assessed Mitchell with a 20% functional impairment rating and apportioned one-half of it to a pre-existing condition.

In the ALJ's opinion of August 1, 1996, the ALJ found Mitchell to be 100% occupationally disabled. The ALJ based his finding upon Mitchell's testimony and upon the medical evidence regarding physical and psychiatric conditions. The ALJ stated in pertinent part as follows:

> As it relates to the medical evidence, this Administrative Law Judge found the evidence presented by Dr. Templin and Dr. Tibbs to be most persuasive regarding Plaintiff's functional impairment, between 15% to 19% according to Dr. Templin and 14% according to Dr. Tibbs. When these functional impairment ratings are combined with the severe restrictions placed upon the Plaintiff, with Dr. Tibbs' lifting restriction of 10 pounds on a frequent or occasional basis, as well as the other limitations placed upon the Plaintiff, regarding Plaintiff's physical injury, this Administrative Law Judge finds support for Dr. Templin's opinion that Plaintiff is totally disabled as far as his ability to return to his prior work or to perform any type of manual labor. The fact that Plaintiff has had surgery performed upon his back by Dr. Tibbs after this injury, is further evidence of the severity of the Plaintiff's low back condition.

* * * * *

> When the Plaintiff's own credible testimony is combined with that given by the physicians referenced above, and the Osborne v. Johnson[, Ky., 432 S.W.2d 800 (1968),] factors are considered, including Plaintiff's age, 42, limited educational abilities, and past work experience, this Administrative Law Judge finds that the Plaintiff has suffered an injury of appreciable proportions which equates to an occupational disability of 100%.

Leeco filed a petition for reconsideration arguing (1) that the ALJ's award was based upon an incorrect interpretation of the evidence, (2) that the ALJ failed to recognize the applicability of the "tier down" provisions under Kentucky Revised Statutes (KRS) 342.730(4), and (3) that the benefit of the "tier down" provision should inure to the employer as well as the Special Fund.

By order dated October 21, 1996, the ALJ amended his opinion and award to include the applicability of the "tier down" provisions pursuant to KRS 342.730(4), but the ALJ rejected Leeco's argument regarding the interpretation of the evidence. Leeco's appeal to the Board included these same arguments plus the argument that the ALJ had erred in awarding lifetime benefits when a portion of the disability was caused by a non-compensable injury. In a February 28, 1997 opinion, the Board addressed each of Leeco's arguments and affirmed the ALJ. This petition for review followed.

Our review of this case is conducted pursuant to Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992), wherein the Supreme Court stated: "The function of further

review of the Board in the Court of Appeals 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." Id. at 687-688.

The first issues we address is Leeco's claim that the ALJ's award was based upon an incorrect interpretation of the evidence. We believe the Board, through its opinion written by Member Greathouse, correctly addressed this issue as follows:

> Dr. Tibbs' report, functional capacity assessment, initially states that Mitchell retains the capacity to lift a maximum of 30 pounds. However, he restricted Mitchell to no more than 10 pounds for frequently lifting and/or carrying weight. He also felt that Mitchell should only occasionally lift and/or carry 10 pounds of weight. It is axiomatic that the ALJ, as fact-finder, has the prerogative to believe some parts of the evidence and disbelieve other parts whether from the same witness or the same parties' total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). As argued by Leeco, it is true a party is entitled to have his claim decided on the basis of correct findings of basic facts. See Cook v. Paducah Recapping Serv., Ky., 694 S.W.2d 684 (1985). However, the functional capacity assessment portion of the Form 107 Medical Report differentiates between maximum lifting of weight at any one time, or frequently lifting or even occasionally lifting. The ALJ specifically relied on the most onerous restrictions imposed by Dr. Tibbs, since other evidence concerning his physical condition revealed significant functional impairment ratings with severe restrictions. This was evidence of substance to adequately support the ALJ's finding of total occupational disability. The argument by Leeco, here, is simply not the kind of egregious mis-reading of the evidence as was the case in Cook which would warrant a modification of the ALJ's decision based upon an erroneous understanding of the evidence.

Leeco's second argument is that the ALJ erred in combining Mitchell's compensable work-related disability with his non-compensable work-related disability to award a total disability. Leeco contends the Legislature in adopting KRS 342.730(a) and (d) specified that when a claimant combines a prior, active, work-related disability with a partial disability caused by the current injury, the claimant is limited to 520 weeks of benefits rather than lifetime benefits. Leeco also argues that Mitchell's failure to file a claim on his 1989 and 1991 injuries resulted in those injuries being non-compensable and that the ALJ erred in using the disability from those non-compensable injuries in awarding total disability benefits. Again, we believe the Board very ably addressed this issue as follows:

> Leeco next argues the ALJ erred in awarding lifetime benefits because part of the disability was caused by a noncompensable injury. Leeco contends that KRS 342.730(1)(a), as amended, prohibits the combination of a work-related injury with a noncompensable injury to award lifetime benefits.
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> KRS 342.730(1)(a), applicable at the time of Mitchell's injury, states:
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> "(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 by KRS 342.740 during that disability. Nonwork-related disability shall not be considered in determining whether the employee is totally disabled for purposes of this subsection."

> Leeco argues that total disability can only be awarded if it is due to the work-related injury on which the claim is based. In making this argument, Leeco points to the provision of KRS 342.730(1)(d) which specifically mentions prior work-related active disability as a prerequisite to an award of 520 weeks disability for a partial award in excess of 50%.
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> We agree with Leeco to the extent it is clear that the intention of KRS 342.730(1)(a), as amended was to do away with some of the burdens on workers' compensation obligors which arose from the decision in Teledyne-Wirz v. Willhite, Ky., 710 S.W.2d 858 (1986). However, the plain language of the statute makes it clear that in considering whether an individual is now totally disabled, the ALJ is to exclude nonwork-related disability. As the ALJ clearly set forth in his Opinion, Mitchell's 20% active disability was work-related though not claimed otherwise. Accordingly, the Board finds no error in the ALJ awarding benefits for lifetime by including a 20% pre-existing active work-related disability [emphasis in original].

Leeco's final argument is that the ALJ erred in failing to apportion its liability according to the total dollar value of the award rather than the total number of weeks of the award. Leeco argues that this Court's application of the "tier down" provisions in Southern, supra, unfairly benefit only the Special Fund. In affirming the ALJ, the Board was required to follow Southern, supra, which held that the reduction of benefits occasioned by KRS 342.730(4) "inure[s] to the party responsible for payment at the time of the reduction." Id. at 903. Like Mitchell, the claimant's age in Southern was such that the employer's liability for payment of benefits would cease long before the claimant's sixty-fifth birthday with the result that

the Special Fund would receive the whole benefit of the "tier down" provision.

Since the Supreme Court in Leeco, Inc. v. Crabtree, Ky., 966 S.W.2d 951 (1998), overruled Southern on this issue, we must reverse the Board on this issue and remand for further proceedings. The relevant portion of the Supreme Court's opinion is as follows:

> In 1994, as in 1982 and 1983 when the claims in Island Creek Coal Co. v. Davis, [Ky.App., 761 S.W.2d 179 (1988),] arose, the defendants' payment periods for a total disability award were based on percentages of the amount of benefits awarded during the worker's projected life expectancy. 803 KAR 25:035. The U.S. Decennial Life Tables which are employed in determining a worker's projected life expectancy indicate that the majority of men will live well into their 70's and the majority of women well into their 80's. In other words, the projected life expectancy of all individuals to whom KRS 342.730(4) applies is significantly greater than age 65. Therefore, like the offset in Island Creek Coal Co. v. Davis, supra, this provision will affect the total amount of benefits payable during a worker's projected life expectancy. There, the offset had the potential to shift a disproportionate share of the award to the Special Fund's payment period. Here, if the construction of KRS 342.730(4) which was adopted by the Court of Appeals in Southern v. R.B. Coal Co., Inc., supra, is followed, a disproportionate share of the award would be shifted to the employer's payment period. Unlike the situation in Pickands Mather & Co. v. Newberg, [Ky., 895 S.W.2d 3 (1995)], there is no offset of gains and losses when all claims are considered in the aggregate.
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> The Special Fund asserts that one of the major purposes of the 1994 amendments to the Workers' Compensation Act was to control its ever escalating liability and that, in keeping with that goal, the legislature intended for the benefit of KRS 342.730(4) to accrue to the defendant in whose payment

period it occurs. It most instances that would be the Special Fund.

We recognize that attempts to contain Special Fund liability have been ongoing for many years; however, we are not persuaded that the sole intent behind every enactment which serves to benefit the Special Fund is the reduction of its liability. In attempting to determine whether the overriding legislative intent for enacting KRS 342.730(4) was to benefit the Special Fund, it is useful to remember that workers' compensation legislation does not create a quasi tort. Its purpose is to replace income which is lost as a result of industrial injury. Income benefits are but one unit in a system of wage-loss protection, and other sources of income replacement such as private retirement benefits and old age Social Security benefits eventually become available to injured workers. A reduction in workers' compensation benefits upon a worker's eligibility for an alternative form of income replacement is consistent with the principle of coordinating the various systems of wage-loss protection in order to avoid a duplication of benefits. See, Estridge v. Stovall, Ky.App., 704 S.W.2d 653 (1986); Larson, Larson's Workers' Compensation Law, § 97, et seq.

We believe that the primary purpose of enacting KRS 342.730(4) was not so much to benefit the Special Fund as to minimize a duplication of benefits. This argument is strengthened by the fact that, in 1996, the legislature amended KRS 342.730(4) to provide for the termination of income benefits after a period of two years or after the worker becomes eligible for old age Social Security benefits, whichever last occurs. Acts 1996, 1st Ex.Sess., ch. 1, § 30. It is further strengthened by the fact that the Special Fund bears no liability for claims arising after December 12, 1996. Acts 1996, 1st Ex.Sess., ch. 1, § 3. We, therefore, conclude that the primary purpose of KRS 342.730(4) was to avoid duplicating other sources of income replacement, particularly old age Social Security. In doing so, the provision benefits both employers and the Special Fund by reducing the value of all total disability awards and many partial

> disability awards. Consistent with KRS 342.120(6) and (7), Island Creek Coal Co. v. Davis, supra, and Whittaker v. Randall Foods, Inc., [Ky., 895 S.W.2d 571 (1995)], apportionment of the projected award should not occur until after its value has been computed.
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> In view of the foregoing, the decision in Southern v. R.B. Coal Co., Inc., supra, is overruled with regard to its effect on the apportionment of liability for partial disability awards and its effect on the apportionment of benefits which fall due during a worker's projected life expectancy. Since those benefits which accrue after a worker outlives the projected life expectancy are the sole liability of the Special Fund, we agree that the Special Fund becomes entitled to the full benefit of KRS 342.730(4) at that time. Accordingly, the decision of the Court of Appeals in the instant claim is affirmed, in part, and reversed, in part. The claim is hereby remanded to the ALJ for a computation of the value of the projected lifetime award for the 1994 injury and for a subsequent apportionment of liability between the employer and the Special Fund.

966 S.W.2d at 954-956.

Thus, to conform with the mandate of Crabtree, we reverse the Board in part and remand this matter to the ALJ to re-calculate the total disability award. In all other respects, the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Hon. Timothy J. Walker
London, KY

BRIEF FOR APPELLEE, MITCHELL:

Hon. Phillip Lewis
Hyden, KY

BRIEF FOR APPELLEE, SPECIAL FUND:

Hon. Judith K. Bartholomew
Louisville, KY