

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-002316-WC

LARRY SHERRILL

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. 92-40490

ANDERSON CONTRACTING, INC.;  
SPECIAL FUND; IRENE STEEN,  
ADMINISTRATIVE LAW JUDGE; and  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING IN PART,  
REVERSING IN PART, AND REMANDING

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BEFORE: GUDGEL, CHIEF JUDGE, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Larry Sherrill petitions for a review of a decision of the Workers' Compensation Board (Board) which affirmed the decision of the Administrative Law Judge (ALJ) finding that the claimant had been paid appropriate amounts of temporary total disability (TTD) at the appropriate times. Appellant contends uninterrupted TTD benefits were called for; and that if TTD benefits were properly terminated at times, then

permanent partial disability (PPD) should have been awarded to cover the periods between TTD.

Appellant, Larry Sherrill, was an employee of Anderson Contracting, Inc. when he was injured on August 7, 1992, when a ditch wall collapsed and crushed his right leg. Between the date of injury and the beginning of PPD benefits on June 3, 1997, appellant underwent several courses of treatment, for both his right knee and for a preexisting left knee injury. During the interim, August 7, 1992 to June 3, 1997, appellant was paid TTD from August 8, 1992 until February 1, 1994; from August 24, 1995 until May 1, 1996; and from March 27, 1997 until July 2, 1997. The ALJ determined there were periods of maximum recovery between the dates of TTD which justified the termination of TTD benefits. The Board agreed, citing the findings of the ALJ and its role in appeals. On appeal to this Court, the claimant makes the same two arguments it made before the Board. As to the ALJ's finding that there were periods which justified TTD and periods which justified termination, we agree with the Board's decision affirming the ALJ on this issue.

Entitlement to TTD is a factual issue for the ALJ and, under Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, (1992), an appeal to the Board is not de novo, but is for the purpose of determining whether the evidence is sufficient to support a particular finding of the ALJ. The Court of Appeals will 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. Our review of the evidence and controlling precedent does not reveal any error in only intermittent TTD for the injury.

The second issue, whether the claimant was entitled to PPD when he was not receiving TTD, requires us to review the ALJ’s award. By opinion and award dated April 17, 1998, the ALJ found the appellant sustained an occupational permanent partial disability of 70%, apportioned 50/50, to commence as of June 3, 1997, and to continue for 425 weeks. The PPD benefit period begins at the time the ALJ determines the claimant has obtained maximum medical improvement (MMI) or recovery. The TTD benefit period in this case runs from the date of injury until MMI or recovery, at which time either permanent total disability (PTD) or PPD, if any, kicks in. W.L. Harper Const. Co., Inc. v. Baker, Ky. App., 858 S.W.2d 202 (1993). It is conceivable that there may be a relapse in the medical condition which justified a reactivation of TTD (as found by the ALJ). From the ALJ’s award, we know the claimant was 70% PPD after the work injury, with periods of TTD. It is only logical that since the date of injury, when the claimant was not TTD, he was PPD, as Kentucky does not recognize temporary partial disability. Id. at 204. Therefore, the 425-week period should have commenced February 2, 1994, and should have been tolled when the relapses justified the TTD. KRS 342.730(1)(b). Neither the Board nor this Court takes exception to the ALJ’s findings that the claimant had multiple periods that justified TTD benefits or that claimant suffers from a 70% permanent partial disability. While the ALJ and the Board

construe the statutes and precedent to allow the award to commence PPD payments after the last TTD, we believe the award should have commenced payments after cessation of the first period of TTD, and tolled such payments during the subsequent periods of TTD. This would better comply with the intent of workers' compensation to provide swift income benefit payments during disability and not merely to compensate for his physical injury. See Harned, Kentucky Workers' Compensation, Second Edition, Section 1:2; Hulsey v. Commonwealth Crime Victims Compensation Bd., Ky. App., 628 S.W.2d 890, 892 (1982); and Princess Coals Incorporated v. Stapleton, Ky., 435 S.W.2d 62, 74 (1968). If the ALJ had found that the claimant suffered no disability during the interim periods between the periods of TTD, then commencement of payments for PPD after the last TTD would have been proper. However, no one is contending that after any of the maximum medical improvement or the end of TTD, that the claimant was not suffering some PPD. We believe the Board and the ALJ misconstrued the statute and precedent in question and, under Kelly, 827 S.W.2d at 687, 688, the second issue, as to the time for commencement of PPD, will need to be remanded for further calculations, which also involves interest on past due payments at the time of the award.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, ANDERSON  
CONTRACTING, INC.:

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