

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002392-WC

COMMONWEALTH ALUMINUM CORPORATION

APPELLANT

V. PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-98678

JAMES L. TUCKER; SPECIAL FUND;
THOMAS A. NANNEY, Administrative
Law Judge; and WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

* * * * *

BEFORE: GUDGEL, Chief Judge; McANULTY and MILLER, Judges.

GUDGEL, CHIEF JUDGE: This matter is before us on a petition for review of a decision of the Workers' Compensation Board (board). Appellant Commonwealth Aluminum Corporation contends that the board erred by affirming a decision of an Administrative Law Judge (ALJ) which awarded both temporary total and permanent partial disability benefits to the claimant, appellee James L. Tucker. We disagree. Hence, we affirm.

Tucker incurred several work-related and nonwork-related injuries and underwent surgeries prior to

sustaining a work-related back injury on June 3, 1996, while he was employed by appellant. Tucker reported the injury, went on vacation, and then continued working until October 1996. He underwent back surgery in February 1997, but he never returned to work.

Evidence was adduced to show that Tucker's orthopedic surgeon believed that Tucker reached maximum medical improvement by August 4, 1997, that he suffered from a functional impairment of 32½%, and that he was permanently and totally disabled. The ALJ subsequently found that Tucker was permanently and totally occupationally disabled as of August 4, 1997, but that 30% of the disability was noncompensable because it stemmed from the prior work-related and nonwork-related injuries. Thus, the ALJ awarded Tucker benefits for a 70% permanent partial disability for a period of 520 weeks commencing August 4, 1997. Further, the ALJ awarded Tucker temporary total disability (TTD) benefits for the period from October 15, 1996, to August 4, 1997. On appeal, the board affirmed the ALJ's award, and this petition for review followed.

Appellant contends that the board erred by determining that Tucker is entitled to recover TTD benefits stemming from the June 1996 injury in accordance with the "whole man" theory and this court's decision in Ingersoll-Rand Co. v. Rule, Ky. App., 867 S.W.2d 205 (1993). We disagree.

It is well established in Kentucky, under the "whole man" theory, that the right to recover compensation as a result

of a work-related permanent total disability is not diminished by the existence of a preexisting disabling condition which did not contribute to that subsequent disability. See Schneider v. Putnam, Ky., 579 S.W.2d 370, 371 (1979). Moreover, this court held in Rule, supra at 207, that the "whole man" theory also applies to awards of TTD benefits if the subsequent "injury alone is sufficient to cause" the TTD, even if the claimant is also found to have suffered a permanent total disability due to the combination of the most recent work-related injury and a preexisting disability.

A review of Rule shows that the underlying facts are parallel to those in the instant action. The claimant in Rule

was found to be totally disabled as the result of a work-related injury she suffered on January 19, 1990, causing 85 percent disability in combination with a 15-percent active disability from a 1976 work-related injury. After the 1990 injury, she returned to work on April 25, 1990, and continued to work until October 11, 1990. In November 1990, she underwent lumbar disk surgery, reaching her maximum medical improvement in April 1991, but was never able to return to work. The ALJ determined that the claimant was permanently totally disabled as of April 11, 1991, due to her current injury and her preexisting active disability. The ALJ also awarded temporary total disability benefits due to the subsequent injury alone from January 25, 1990, until the claimant returned to work on April 25, 1990, and for the period of time from October 11, 1990, to April 11, 1991.

Id. at 206. Here, as in Rule, Tucker returned to work for several months after his injury, but he then became unable to work even after undergoing surgery, and the ALJ determined that

he was permanently and totally disabled. Tucker therefore was awarded TTD benefits for the period between his last date of work and the date of his maximum medical improvement, as well as benefits for permanent partial disability.

Appellant asserts that the ALJ should have reached a different result based on the precedents established in Young v. Johnson County Board of Education, Ky., 479 S.W.2d 638 (1972), Allied Corporation v. Hornsby, Ky. App., 661 S.W.2d 480 (1983), and Land v. Peabody Coal Co., Ky. App., 619 S.W.2d 501 (1981). Appellant argues that the ALJ and the board erred both by failing to find that Tucker's last day of work was the date of the onset of his permanent total disability, and by finding that he was entitled to TTD benefits between October 1996 and August 1997. However, as noted in Rule, supra at 206, the cases cited by appellant are factually distinguishable from both Rule and the instant action because none of the cited cases indicate that evidence existed to show that any of the claimants had a final injury which was "sufficient alone to have caused a temporary period of total disability."

Here, by contrast, probative evidence was adduced to show that Tucker's prior disabling condition was dormant before the 1996 injury, that Tucker was able to work full time prior to the 1996 injury, and that the 1996 injury necessitated the subsequent surgery. We cannot agree with appellant's contention that such evidence was insufficient to support a finding that the 1996 injury would have resulted in an award of TTD even if a

prior partial disability did not exist. Moreover, although appellant complains on appeal that the ALJ failed to make specific findings of fact regarding the "whole man" theory in awarding TTD benefits, no such objection was timely raised below, and therefore any such failure to make findings was waived. Cf. Eaton Axle Corp. v. Nally, Ky., 688 S.W.2d 334 (1985).

The board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John C. Morton
Samuel J. Bach
Henderson, KY

BRIEF FOR JAMES L. TUCKER:

Max S. Hartz
Owensboro, KY

BRIEF FOR SPECIAL FUND:

David W. Barr
Louisville, KY