

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000648-WC

CENTRAL KENTUCKY STEEL

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 97-86812

CHARLES F. WISE;
HON. IRENE STEEN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * * **

BEFORE: KNOPF, MILLER, AND SCHRODER, JUDGES.

MILLER, JUDGE: Central Kentucky Steel (CKS) asks us to review an opinion of the Workers' Compensation Board (board) rendered February 19, 1999. We affirm.

Charles F. Wise, a "journeyman ironworker," worked for CKS in October, November, and December 1996, after which he was laid off. He was unemployed from December 10, 1996, until March 1997 when he returned to work for CKS. Although he was unable to work during that time period due to a non-work related finger injury, he testified that he would have elected not to work even if the injury had not occurred. Wise worked for CKS seven days

between March 18, 1997 and April 28, 1997, when he fractured his left arm in a work-related accident. During that time, he earned \$18.76 per hour. CKS voluntarily paid temporary total disability (TTD) benefits of \$89.41 per week from April 29, 1997, through August 1, 1997. At the end of September 1997, Wise moved to Florida and returned to work earning approximately \$13.00 per hour. He filed for benefits under the Kentucky Workers' Compensation Act (Ky. Rev. Stat (KRS) Chapter 342). The arbitrator awarded Wise TTD benefits in the amount of \$447.03 per week from April 29, 1997, through August 1, 1997. He also determined Wise to have a 1% permanent partial impairment. Based on same, he awarded Wise weekly benefits of \$2.51 for 425 weeks. Finally, the arbitrator awarded Wise medical benefits for occupational therapy in accord with the Kentucky medical fee schedule. CKS filed a request for a *de novo* review before an administrative law judge (ALJ). KRS 342.275. In an opinion and award rendered November 6, 1998, the ALJ affirmed all of the arbitrator's determinations with the exception of extending the duration of TTD benefits. He awarded them through September 30, 1997. The ALJ further determined that a disputed medical bill from Lee Memorial Hospital (Lee Memorial) in Florida was "compensable." CKS appealed to the board, which, in turn, affirmed the ALJ's opinion and award. This appeal followed.

CKS alleges that the ALJ erred by: 1) awarding TTD benefits through September 30, 1997; 2) finding Wise was entitled to the maximum benefit rate allowable for 1997; 3) failing to reduce Wise's income benefits by one-half pursuant to KRS

342.730(1)(c)(2); and, 4) finding that the disputed medical bill was compensable.

As Wise was successful before the ALJ, the question on appeal is whether the decision was based upon substantial evidence. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984).

CKS first maintains that the ALJ erred in awarding TTD benefits through September 30, 1997, inasmuch as Dr. Ronald Gardner released Wise to return to work in early August. We disagree. KRS 342.0011(11)(a) defines *TTD* as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment." Dr. Gardner testified that Wise reached maximum medical improvement on October 28, 1997. Wise did not return to work until late September. In sum, we believe the ALJ's award of TTD through September 30, 1997, was supported by substantial evidence.

Next, CKS argues that the ALJ erred by utilizing KRS 342.140(1)(e) to determine that Wise qualified for benefits at the maximum rate for 1997. Specifically, CKS asserts that under subsection (e), Wise was required, yet failed, to prove that he would have worked during the 13 weeks immediately preceding his injury. We read no such requirement into that subsection. KRS 342.140(1)(e) is applied when an employee has worked for his employer fewer than the 13 weeks immediately preceding a work-related injury. The employee must then establish the wages that he would have earned if he had been employed for the full 13

weeks and had worked when work was available to other employees in a similar occupation. There is no dispute that Wise did not work for CKS for 13 weeks immediately preceding his injury. There was testimony that work was plentiful and Wise could have been employed at \$18.76 for the full 13 weeks preceding the accident. We believe this to be substantial evidence supporting the ALJ's decision.

Next, CKS insists that Wise's income benefits should have been reduced by one-half pursuant to KRS 342.730(1)(c)(2). In support of this contention, CKS maintains that Wise could have earned equal to or greater than the wages he earned before the accident had he stayed in Kentucky and not moved to Florida. KRS 342.730(1)(c)(2) states in relevant part that:

[i]f 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 otherwise payable under paragraph (b) of this subsection shall be reduced by one-half(1/2) for each week during which that employment is sustained. . . .

Under this section, benefits are reduced only if an employee actually returns to work earning an average weekly wage equal to or greater than the average weekly wage he earned before the injury. Wise's average weekly wage after the injury was clearly less than his pre-injury earnings. As such, we cannot say the ALJ erred in refusing to reduce Wise's benefits by one-half.

Last, CKS asserts that the ALJ erred in ruling against it regarding the medical fee dispute. Said bill is from Lee Memorial where Wise received occupational therapy. Lee Memorial billed CKS for said services in accordance with Florida workers'

compensation law. Florida law apparently allows medical providers a higher fee than does Kentucky law for such services. In accordance with KRS 342.035, however, CKS paid Lee Memorial the amount specified in the Kentucky medical fee schedule for such services. The disputed bill is for the difference between the amount allowed under Florida law and the amount paid by CKS pursuant to Kentucky law.

The ALJ held that "the aforementioned disputed medical bill is found to be compensable." We do not interpret the ALJ's comment as meaning that payment of the Lee Memorial bill should be made in accordance with Florida law. In our view, medical payments cannot be authorized, whether by an in-state or out-of-state provider, in excess of the Kentucky medical fee schedule. KRS 342.035. Any deficiency between the payment authorized under Kentucky law and the amount charged by Lee Memorial is a matter to be resolved between the provider and patient. In sum, we agree with the board that no order is necessary as CKS's remedy is found in KRS 342.035.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

William P. Swain
Douglas A. U'Sellis
Louisville, KY

BRIEF FOR APPELLEE WISE:

Neil S. Weiner
Louisville, KY