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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2005-CA-000847-WC

MELISSA MONTGOMERY — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-01-89184

UNITED PARCEL SERVICE;
HON. W. BRUCE COWDEN, JR.,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: KNOPF AND TACKETT, JUDGES; ROSENBLUM, SENIOR JUDGE.[1]

KNOPF, JUDGE: Melissa Montgomery appeals from an opinion and order by the Workers' Compensation Board (Board) that vacated a portion of the Administrative Law Judge's (ALJ) order requiring

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

United Parcel Service (UPS) to pay her future medical expenses. We agree with Montgomery that, under the current version of KRS 342.020(1), an employer may be required to pay the employee's reasonable medical expenses incurred as a result of the injury, even in the absence of any permanent disability. Hence, we reverse the Board's order and reinstate the ALJ's award.

The underlying facts of this action are not in dispute. Montgomery suffered a work-related injury on April 24, 2001, while working for UPS. In an opinion and award entered on August 18, 2003, the ALJ found that Montgomery had sustained her burden of showing that she had suffered a work-related injury, but had not proven that the injury produced any permanent occupational disability. Consequently, the ALJ found that she was entitled to temporary total disability benefits from April 25, 2001, through February 19, 2002, when she reached maximum medical improvement (MMI).

The ALJ indicated in the opinion that Montgomery was entitled to payment of medical expenses, but did not expressly make a medical-benefits award. In her petition for reconsideration, Montgomery requested that the award be amended to expressly include both past and future medical expenses. The ALJ entered an amended order on September 25, 2003, directing UPS to pay Montgomery's past and future medical expenses related to the injury.

UPS paid all medical expenses incurred by Montgomery up to the date of the award, but it appealed the award of future medical expenses. In a 2-1 opinion entered on April 1, 2005, the Board vacated the ALJ's award of future medical expenses. A majority of the Board concluded that KRS 342.020(1) permits an award of medical expenses incurred only during the period of the employee's disability. Because Montgomery had reached MMI and has no permanent disability rating, the Board found that UPS was not required to pay for any additional medical expenses which she may incur. Montgomery now appeals from this order.

The function of the Court of Appeals in reviewing a Board decision 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."[2] However, we review issues involving statutory interpretation *de novo*, and without deference to the construction given by the Board.[3] Furthermore, our workers' compensation laws should be

[2] Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-688 (Ky. 1992).

[3] Cinelli v. Ward, 997 S.W.2d 474, 476 (Ky.App. 1998).

interpreted liberally in light of the "munificent, beneficent and remedial purposes of the Workers' Compensation Act."[4]

This case turns on the interpretation of KRS 342.020(1), which provides in pertinent part:

> In addition to all other compensation provided in this chapter, the employer shall pay for the cure and relief from the effects of an injury . . . the medical, surgical, and hospital treatment, including nursing, medical, and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability . . . The employer's obligation to pay the benefits specified in this section shall continue for so long as the employee is disabled regardless of the duration of the employee's income benefits.

The first sentence of KRS 342.020(1) confines an award for medical expenses to those expenses which "may reasonably be required at the time of the injury and *thereafter during disability.*" (*Emphasis added*). Moreover, KRS 342.020(1) reiterates: "The employer's obligation to pay the benefits specified in this section shall continue *for so long as the employee is disabled* regardless of the duration of the employee's income benefits." (*Emphasis added*). On the other hand, the final sentence also specifies that the employer is liable for payment of medical expenses "regardless of the duration of the employee's income benefits."

[4] Coal-Mac, Inc. v. Blankenship, 863 S.W.2d 333, 334 (Ky.App. 1993).

A majority of the Board found that the references to "disability" and "for so long as the employee is disabled" must mean something in addition to a situation in which medical treatment for the cure and relief from the effects of the injury is reasonably required. The Board also noted the long-standing rule that an ALJ may award medical expenses even in the absence of permanent disability because it is possible for a non-disabling injury to require medical care.[5] However, the Board found that the 1996 amendments to KRS 342.020(1), which added the references to disability, demonstrate that the General Assembly intended to alter this rule. Therefore, the Board concluded that the current version of the statute requires an employer to pay medical expenses which are incurred during a period of the employee's disability. Because Montgomery had reached MMI and had no permanent disability rating, the Board found that UPS is not liable for payment of any future medical expenses which Montgomery may incur as a result of her work-related injury.

Nevertheless, we agree with the separate opinion by Board Member Stanley that the 1996 amendment to KRS 342.020(1) does not expressly link a claimant's right to receive reasonable medical care to his entitlement to an award of temporary or

[5] *See* Cavin v. Lake Construction Co., 451 S.W.2d 159 (Ky. 1970); Mountain Clay, Inc. v. Frazier, 988 S.W.2d 503 (Ky.App. 1998).

permanent disability income benefits, and we adopt the following portion of his dissenting opinion:

> The issue of whether an injured worker is entitled to future medical benefits where the subject injury does not warrant a corresponding award of permanent disability was first addressed by the Kentucky Court of Appeals, now the Supreme Court of Kentucky, in Cavin v. Lake Construction Co., 451 S.W.2d 159 (Ky. 1970). In that case, the claimant received multiple injuries, including injuries to his neck and back, when he tripped and fell into a ditch while carrying an 80-pound jackhammer on his shoulder. The "old" Workman's Compensation Board rejected his claim for income benefits, finding the injury produced no occupational disability arising out of the accident, but nevertheless awarded medical benefits pursuant to KRS 342.020. In affirming the old Board's ruling, Judge Palmore, writing for the court, stated as follows: "We do not believe it is necessarily inconsistent for the board to award payment of medical expenses without finding some extent of disability. It is not impossible for a non-disabling injury to require medical attention."
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> Of course as previously mentioned, since the court rendered its decision in Cavin, *supra*, KRS Chapter 342 has undergone several transformations, with the most far-reaching changes having occurred first in 1987, and again more recently in 1996 and 2000. As pointed out by the majority, following those changes, the court, to a limited degree, revisited the issue of entitlement to future medical benefits in Robertson v. United Parcel Service, [64 S.W.3d 284 (Ky. 2001)]. Nevertheless, Cavin, *supra*, remains factually distinguishable from Robertson, supra, and for that reason is still good law.[*footnote omitted*]

As acknowledged by the majority, the claimant in Robertson, *supra*, failed to prove to the satisfaction of the ALJ anything more than a temporary work-related exacerbation of a pre-existing, nonwork-related condition. Because the injury produced no permanent effects, the claimant in Robertson was found to be entitled only to the medical expenses previously paid by his employer during the temporary flare-up of symptoms. The focus of the court, therefore, was on the claimant's entitlement to future medical benefits beyond a point in time when he returned to his baseline state of health as it existed prior to the work-related event. Because the claimant in Robertson was determined to have made a full recovery, the court held that his entitlement to workers' compensation benefits was properly extinguished. By contrast, the claimant in Cavin, *supra*, never returned to his pre-injury state of health.

Hence, in every instance where future medical benefits are sought absent an award of indemnity benefits the question remains — is the claimant's situation more comparable to Cavin, *supra*, or more akin to Robertson, *supra*. In other words, are the effects of the claimant's injury temporary or permanent? The claimant's entitlement to an income disability award is not the deciding factor. Rather, the issue turns on whether the effects of the injury are enduring to the degree that there is a resulting need for medical treatment beyond the point in time when the claimant reaches maximum medical improvement.

I would agree that "disability," as used in Kentucky's workers' compensation law, is a term of art. Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968). However, it is also a term of art that is long established. Prior to the 1996 amendments to the Act, disability was statutorily defined at KRS 342.0011(11), formerly KRS 342.620(9) and later KRS 342.620(11), as follows:

> 'Disability' means a decrease of wage earning capacity due to injury or loss of ability to compete to obtain the kind of work the employee is customarily able to do, in the area where he lives, taking into consideration his age, occupation, education, effect upon employee's general health of continuing in the kind of work he is customarily able to do, and impairment or disfigurement.

The above codification by the legislature first enacted in 1972 was derived from the original definition of disability established by the Kentucky Court of Appeals in the landmark decision of Osborne v. Johnson, *supra*, rendered in 1968.

Since December 12, 1996, the effective date of the 1996 amendments, the Act has been without a single "disability" definition. Instead, the new Act provides us only with definitions of "temporary total disability," "permanent partial disability," "permanent total disability" and "permanent disability rating." See KRS 342.0011(11)(a), (b) and (c), and (36). These are as follows:

> (11) (a) 'Temporary total disability' means 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;
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> (b) 'Permanent partial disability' means the condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work; and
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> (c) 'Permanent total disability' means the condition of an employee who, due to an injury, has a permanent disability rating

> and has a complete and permanent inability to perform any type of work as a result of an injury, except that total disability shall be irrebuttably presumed to exist for an injury that results in:
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> 1. Total and permanent loss of sight in both eyes;
> 2. Loss of both feet at or above the ankle;
> 3. Loss of both hands at or above the wrist;
> 4. Loss of one (1) foot at or above the ankle and the loss of one (1) hand at or above the wrist;
> 5. Permanent and complete paralysis of both arms, both legs, or one (1) arm and one (1) leg;
> 6. Incurable insanity or imbecility; or
> 7. Total loss of hearing.
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> * * * * *
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> (36) 'Permanent disability rating' means the permanent impairment rating selected by an administrative law judge times the factor set forth in the table that appears at KRS 342.730(1).

The majority is correct that KRS 342.020(1) demarcates the duration of an award of medical benefits according to the period of the injured worker's "disability." However, nowhere does the Act expressly link a claimant's right to receive reasonable medical care under KRS 342.020(1) to his entitlement to an award of temporary or permanent disability income benefits. More importantly, the language of KRS 342.020 imposes no requirement that a claimant demonstrate evidence of a "permanent disability rating" as prerequisite to a permanent award of medical benefits, as does the indemnity side of the equation. For this reason, "disability," as utilized in KRS 342.020 is not, in my opinion, necessarily

synonymous with the phrases “temporary total disability”, “permanent partial disability” or “permanent total disability” as those terms are intended for purposes of calculating awards of income benefits pursuant to KRS 342.730. Rather, “disability,” as used in KRS 342.020, is dependent on the duration of a claimant’s need for medical care, depending on the evidence of record and the particular fact findings made by the ALJ, irrespective of the presence or absence of a measurable functional impairment rating under the AMA Guides, a permanent disability rating or an award of income benefits. When, for purposes of KRS 342.020, the duration of an employee’s disability is permanent, as was the case in Cavin, *supra*, the claimant has a right to reasonable and necessary medical treatment so long as symptoms persist and some cure and/or relief can be provided. By contrast, where the employee’s disability is determined to be temporary, as in Robertson, *supra*, the right to medical treatment spans only that period of time until the employee reaches a pre-injury level of improvement.

Because under the existing Act both “permanent partial disability” and “permanent total disability” incorporate “permanent disability rating” as part of their explanations, I interpret the intent of these definitions as being primarily directed toward operation of the formulas for the calculation of benefits set out in KRS 342.730 as amended in 1996 and 2000. I do not believe these amendments were intended necessarily to eliminate the historic definition of “disability” with regard to all other provisions of the Act. I believe this is the same interpretation which is the basis for the [S]upreme [C]ourt’s holdings in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000) and progeny. Specifically, I direct the majority to the following language included in Hamilton, supra;

> An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c) and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with Osborne v. Johnson, *supra*, it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of 'work' clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. See, Osborne v. Johnson, *supra*, at 803. (Emphasis added.)

Id. at 51.

I believe these same factors are also applicable to the term “disability” as used in KRS 342.020(1). What then qualifies as “disability” for purposes of awards of future medical benefits? In my opinion, all that is required is substantial evidence to support a finding that, within a reasonable degree of probability, the injured worker will require additional medical treatment to aid in the cure and/or relief of a work-related condition beyond the time maximum medical improvement is achieved. Although a

worker has no disability rating or in the future may not miss sufficient time from work when receiving medical care to qualify for temporary income benefits, a change in job duties due to permanent restrictions or time lost from work to attend doctors' appointments and participate in medical treatment, even if only infrequently, nonetheless represents an "interference with vocational capabilities" and, as such, qualifies as "disability" for purposes of KRS 342.020. Ira A. Watson Department Store v. Hamilton, *supra*.

In this instance, Melissa Montgomery was found to have sustained a work-related injury. The evidence of record supports that finding. The ALJ, in his judgment as trier of fact, after considering the record as a whole, also determined in spite of the respondent's lack of a permanent impairment rating that she remains in need of future medical care as a result of the effects of the injury. That finding, too, is supported by substantial evidence – a point of fact the majority conspicuously fails to address. Although Dr. Gleis felt that Montgomery was at maximum medical improvement and assessed a 0% impairment rating, he, nevertheless, opined that the respondent would benefit from a future exercise program for the lumbar spine. From that statement, as well as the other medical and lay evidence of record including the respondent's own testimony regarding her ongoing symptoms, I believe the ALJ, as fact finder, could easily infer that such an exercise program would be monitored by someone in the medical profession and, therefore, some limited future medical benefits relative to Montgomery's work-related injury are appropriate. Cavin v. Lake Construction Co., *supra*; Ira A. Watson Department Store v. Hamilton, *supra*; Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). Such reasonable inferences remain, in my opinion, a matter of discretion for the ALJ. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979);

> Wal-Mart v. Southers, 152 S.W.3d 242 (Ky. App. 2004). Moreover, we should not forget that employers, pursuant to KRS 342.020, are guaranteed due process of law under such circumstances. UPS would remain free to challenge the reasonableness and necessity of any proposed medical regimen. *See* 803 KAR 25:012; National Pizza Co. v. Curry, 802 S.W.2d 949 (Ky.App. 1991).

Accordingly, the April 1, 2005, order of the Workers' Compensation Board is reversed and the September 25, 2003, award entered by the ALJ is reinstated.

TACKETT, JUDGE, CONCURS.

ROSENBLUM, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ROSENBLUM, SENIOR JUDGE, DISSENTING: I respectfully dissent. I believe that the majority opinion issued by the Workers' Compensation Board correctly determined that Melissa Montgomery was only entitled to recovery of medical expenses until she reached maximum medical improvement in 2002. KRS 342.020(1) limits an employer's medical benefit obligation temporally to "the time of the injury and thereafter during disability" and only "for so long as the employee is disabled." The 1996 amendments to the Act deleted the prior occupational definition of the term "disability" set forth in KRS 342.0011(11) and substituted in its place the present statutory definitions of temporary total disability, permanent partial disability and permanent total disability. KRS 342.0011(11)(a)

defines temporary total disability as meaning “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 work.” Melissa Montgomery received temporary total disability benefits for the period commencing April 25, 2001 through and including February 19, 2002. She had no permanent impairment or permanent disability. Furthermore, she was found to have reached maximum medical improvement. There is no finding in the record indicating that Melissa Montgomery has not reached a level of improvement that would permit a return to work. Because her disability as defined in KRS 342.0011(11)(a) concluded, an award of future medical expenses is not justified and should be limited to those expenses incurred until the date that she reached maximum medical improvement.

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