

RENDERED: JANUARY 15, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000833-WC

PATRICIA L. SHAW, DECEASED; AND
STEPHEN WALTER SHAW, EXECUTOR
OF THE ESTATE OF PATRICIA L. SHAW

APPELLANTS

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-01544

JANE TODD CRAWFORD HOSPITAL,
AS INSURED BY KIGA; JANE TODD CRAWFORD
HOSPITAL, AS INSURED BY KESA; HON.
HOWARD E. FRASIER, ADMINISTRATIVE
LAW JUDGE; AND THE WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON AND DIXON, JUDGES; HENRY,¹ SENIOR JUDGE.

CAPERTON, JUDGE: The Estate of Patricia Shaw (Shaw) appeals an August 1, 2008, Opinion of the Workers' Compensation Board affirming the decision rendered by Administrative Law Judge Howard Frasier, Jr. (ALJ) on February 27, 2008, reversing in part, and remanding. After a thorough review of the record, the arguments of the parties, and the applicable law, we affirm.

Shaw is a former licensed practical nurse who worked for the Appellee, Jane Todd Crawford Hospital, for almost twenty years. On August 7, 2000, Shaw was working on the psychiatric unit when one of the residents grabbed and jerked her right arm, and kicked her in the right shoulder, resulting in a torn labrum and accompanying impingement syndrome for which she underwent arthroscopic surgery on October 24, 2000. Following physical therapy, Shaw returned to work at the hospital in early 2001, with no restrictions.

Thereafter, on May 15, 2001, Shaw sustained a second injury after slipping on a freshly mopped bathroom floor. Shaw apparently reinjured her right shoulder and also sustained a cervical injury, resulting in a right C5-C6 herniation with a contusion of the right C6 nerve root. Conservative treatment was attempted, but Shaw ultimately underwent a C5-6 discectomy and fusion with bone bank graft under the direction of Dr. Christopher Shields. Following another round of physical therapy, Shaw again returned to her previous job at the hospital.

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

On the dates of the aforementioned injuries, Jane Todd Crawford Hospital was insured by Kentucky Insurance Guaranty Association (KIGA). Those claims were resolved by way of a settlement agreement entered into by the parties and approved by the ALJ on January 13, 2003. Pursuant to the terms of the settlement agreement, Shaw received a total of \$38,265.30, which included a lump sum payment of \$9,000.70, representing 425 weeks of permanent partial disability (PPD) benefits for a 10 percent whole person impairment rating on the 2000 right shoulder injury, as well as a lump sum payment in the amount of \$29,264.60, representing 425 weeks of PPD benefits for a 25 percent whole person impairment rating for the 2001 cervical injury.

Although at the time of settlement, Shaw was performing the same type of work as at the time of her injuries, shortly following the settlement, she was advised by her supervising physician that it was no longer safe for her to remain in the psychiatric unit. Accordingly, Shaw was placed into a coding position. Shaw apparently performed the coding duties for several months until she began experiencing numbness in her fingers and a proclivity to drop things.

Accordingly, Shaw filed a Form 101 Application for Resolution of Claim on October 11, 2005, alleging that she had developed carpal tunnel syndrome as the result of cumulative trauma on November 11, 2003, at which time Jane Todd Crawford Hospital was insured by Kentucky Workers' Compensation Fund (KESA). In addition, Shaw filed a January 23, 2006, motion to reopen the January 13, 2003, settlement based upon an alleged increase in impairment. All of

these claims were consolidated before the ALJ for decision. Thereafter, on April 28, 2006, Shaw ended her employment with the hospital, and has not returned to work since that time. We further note that unfortunately, Shaw has since passed away for reasons unrelated to the work injury.

In an opinion and order dated October 31, 2006, the ALJ dismissed Shaw's claim for carpal tunnel syndrome, as well as her claim for permanent total disability benefits and additional benefits for a 2x multiplier pursuant to KRS 342.370(1)(c)2 and 4. Shaw appealed that decision. On April 6, 2007, the Board affirmed the decision of the ALJ with respect to the carpal tunnel claim, as well as with respect to the claim for an award based on an increase in occupational disability. The case was remanded, however, for additional findings addressing the

application of KRS 342.730(1)(c)(1), (2) and 4,² using an analysis under *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003).³

In a November 2, 2007, opinion, this Court affirmed the decision of the Board regarding the carpal tunnel claim, as well as with respect to the claim alleging an increase in occupational disability. However, this Court disagreed with the ALJ and the Board, finding that there was an independent right to reopen for consideration of the 2x multiplier pursuant to KRS 342.730(1)(c)(4), and that findings pursuant to *Fawbush* were not required. Accordingly, this Court affirmed in part, vacated in part, and remanded the claim to the ALJ with instructions to

² KRS 342.730(1)(c), in pertinent part, provides as follows:

- (1) Except as provided in KRS 342.732, income benefits for disability shall be paid to the employee as follows:
 - (c) 1. If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments; or
 2. If 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 shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments.
 4. Notwithstanding the provisions of KRS 342.125, a claim may be reopened at any time during the period of permanent partial disability in order to conform the award payments with the requirements of subparagraph 2. of this paragraph.

³ In *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky.2003), the Kentucky Supreme Court addressed the application of KRS 342.730(1)(c)1 and (c) 2. The Court concluded that, in circumstances where both subsections apply, the ALJ has the authority to choose which benefit is most appropriate under the facts of the case. *Id.* at 12. Specifically, the Court noted, “[i]f the evidence indicates that a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future, the application of paragraph (c)1 is appropriate.” *Id.*

consider the application of the 2x multiplier pursuant to KRS 342.730(1)(c)(2) and (4).

On February 27, 2008, the ALJ issued an opinion upon remand in which he awarded Shaw additional PPD benefits in the amount of \$90.02 per week, effective July 28, 2006, and to continue for the remainder of the 425-week period, which began on February 1, 2002, plus interest of 12 percent per annum on any past and unpaid installments of compensation. The ALJ arrived at the weekly amount of \$90.02 based upon an independent review of the impairment ratings provided in the claim. The opinion upon remand was appealed to the Board by Shaw, who asserted that statutory and caselaw required an additional award of benefits of \$107.59 per week from April 26, 2006, through the remaining 425 weeks, which she asserts began on January 14, 2003, the day the settlement agreement was approved. Shaw passed away on June 11, 2008.

On August 1, 2008, the Board reversed the ALJ and instructed him to enter an order for additional benefits to be paid to Shaw beginning April 26, 2008, but did uphold the ALJ's decision as to the date on which the 425-week disability period began, as well as his determination that the weekly benefit amount was \$90.02 pursuant to KRS 342.730(1)(c)(2). Following the issuance of the Board's opinion in this regard, Shaw appealed to this Court.

On January 23, 2009, this Court issued an opinion vacating the August 1, 2008, opinion of the Board due to the fact that the Estate of Patricia Shaw had not been substituted as a party. The matter was remanded to the Board

for consideration of whether or not Shaw's motion to substitute a party was sufficient to revive the action. The Board issued an opinion on March 31, 2009, granting Shaw's motion to substitute party, and deemed that the action had been revived.

Shaw's estate now appeals to this Court, asking this Court to review the portion of the Board's decision relating to the issue of the beginning date for the 425-week period of PPD and the correct benefit rate pursuant to KRS 342.730(1)(c)(2). Shaw asserts that the 425-week period of PPD should have commenced on January 14, 2003, the day following approval of the settlement agreement, as opposed to the February 1, 2002, date determined by the ALJ, which was the date following the January 31, 2002, termination of temporary total disability benefits which the Hospital had previously been paying to Shaw. She also asserts that the ALJ should have used a \$107.59 weekly benefit rate, as opposed to a weekly benefit rate of \$90.02.

On appeal, Shaw isolates the issues as being whether or not a date different than the date of the entry of the settlement agreement can be used to begin weekly benefits when the reopening is made pursuant to KRS 342.730(1)(c)(2) and (4), and whether a change in impairment rating can be made on a claim resolved by settlement upon reopening pursuant to KRS 342.730(1)(c)(2) and (4).

At the outset, we note that when reviewing a decision of the Workers' Compensation Board, the function of the Court of Appeals is to correct the Board only where it 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. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). We review this matter with that standard in mind.

On appeal to this Court, the Hospital contends that Shaw's argument concerning the starting date for the 425-week period of PPD benefits is moot. In so arguing, the Hospital correctly notes that Shaw passed away on June 11, 2008, due to nonwork-related causes. Thereafter, on July 22, 2008, her counsel filed a motion to substitute her estate as a party, and continue benefits. The Hospital now argues that there is no evidence in the record showing that Shaw had any dependents who would qualify for benefits under KRS 342.730, and that accordingly, the only benefits to which she would be entitled would be those which would have accrued prior to her death.

The Hospital asserts, and we believe correctly in this instance, that the only reason why the proper start date for the PPD benefits is an issue is in order for the correct end date to be determined. However, in light of Shaw's death, the Hospital asserts that this issue is moot, regardless of the date on which the increased benefits would have begun, they would have ceased long after her death.

Having reviewed the record, we are compelled to agree with the Hospital with respect to this issue. In her brief to this Court, Shaw argues that her 425-week benefit period should have begun on January 14, 2003, the date following approval of her settlement agreement, as opposed to the February 1, 2002, date determined by the ALJ. Were we to rely upon the date determined by

the ALJ, Shaw's benefits would expire approximately one year earlier than if we relied upon the date asserted by Shaw. As the Hospital correctly notes, the end date of the PPD benefits in the matter *sub judice* is now moot, in light of Shaw's passing.

Certainly, we are aware that KRS 342.730 provides survivor's rights in instances where a claimant who has received an award of income benefits passes away for causes unrelated to the injury prior to such time as the award has been paid in full. Unfortunately, our review of the record in this instance reveals that Shaw's estate has failed to establish the existence of any survivors qualified to receive these benefits, as is required by KRS 342.730(3). Accordingly, we are compelled to find that the issue raised by Shaw concerning the appropriate start date for benefits is moot, for regardless of whether the benefits were to end on the date resulting from the ALJ's determination or the date asserted by Shaw, she received all benefits which had accrued prior to her death. Having so found, we refrain from issuing a prospective opinion on that issue at this time, and turn now to the second issue raised by Shaw's estate on appeal.

As her second basis for appeal to this Court, Shaw is requesting additional monetary benefits pursuant to KRS 342.730(1)(c)(2) and (4), for which she asserts she does not need proof of an increase in impairment rating, but simply a finding that the employee returned to work at a weekly wage equal to or greater than the average weekly wage at the time of the injury and that the employment ceased. Shaw asserts that those findings have been made in this claim, and that

accordingly, she is entitled to additional benefits at two times the amount otherwise payable.

Shaw asserts that since the settlement agreement has not been reopened for an increased impairment, the agreed upon settlement computation of 10 percent impairment for the right shoulder injury and 25 percent for the cervical injury are the fixed rates in this claim, and must be used as the basis for the additional monetary benefits. Shaw notes that the settlement agreement provided for Shaw to receive an agreed upon weekly amount of \$107.59, which was discounted pursuant to the regulatory rate and paid in a lump sum.

Shaw now argues that the Board misconstrued statute and caselaw in not directing the ALJ to award additional benefits to Shaw pursuant to KRS 342.730(1)(c)(2) and (4) in the amount of \$107.59 per week from April 26, 2006, for the remaining 425 weeks after January 14, 2003, with interest at the rate of 12 percent per annum on all past and unpaid installments of compensation.

In response, the Hospital notes that during the course of litigation of the claim below, Dr. Lowe assigned impairment ratings of 4 percent for the 2000 right shoulder injury, and 25 percent for the 2001 cervical spine injury. In determining the benefit amount of \$90.02 per week to which he found Shaw to be entitled, the ALJ relied upon the ratings assigned by Dr. Lowe, which he found to be the most credible. As the Hospital correctly notes, KRS 342.125(7) clearly provides that where an award is the product of a settlement, no statement contained in the agreement is considered binding on the parties.

As Shaw reopened this claim pursuant to KRS 342.730(1)(c)(1), the ALJ was free to assign a new impairment rating on reopening, and was thus required to issue a finding as to what the impairment ratings would have been at the time of the original settlement, which he did. As our Supreme Court has previously held, the figures for impairment or disability contained in a settlement agreement represent a compromise, and might or might not equal the worker's actual impairment or disability at the time of settlement. *Whitaker v. Roland*, 998 S.W.2d 479 (Ky. 1999).

In the ALJ's analysis, he noted that had no settlement agreement occurred, the actual payable rate of weekly benefits would have been \$7.74 per week for benefits arising from the 2000 injury to the shoulder, and \$82.28 per week for the May 21, 2001, cervical injury, for a combined value of \$90.02 for all relevant weeks, based upon the rating of Dr. Lowe.

Having reviewed the record and applicable law, we affirm the Board, which held that the ALJ separately determined the impairment ratings for the 2000 and 2001 injuries based on substantial evidence, and then calculated the appropriate disability rating pursuant to KRS 342.730(1)(b), and combined the amounts accordingly. It was the ALJ's duty, in a situation involving reopening after a prior settlement, to make a determination as to the claimant's actual impairment and disability rating at the time of settlement prior to deciding the merits of the reopened case. *Newberg v. Davis*, 841 S.W.2d 194 (Ky. 1992). Our review of the record reveals that the ALJ did so in this instance and that his

findings, based upon the opinions of Dr. Lowe, were supported by substantial evidence. Accordingly, we affirm.

Wherefore, for the foregoing reasons, we affirm the opinion of the Workers' Compensation Board, holding that additional compensation is payable at a rate of \$90.02 per week from April 28, 2006, for as long as Shaw's average weekly wage was below that which it was at the time of her original injures, and not to extend past the date of Shaw's passing, for reasons previously set forth herein.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEES:

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