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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001371-WC

CLIMATE CONTROL OF KENTUCKY — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-01-75857

TOM MUTHLER; HON. JAMES L. KERR, ADMINISTRATIVE LAW JUDGE; AND THE WORKERS' COMPENSATION BOARD — APPELLEES

AND

NO. 2009-CA-001461-WC

TOM MUTHLER — CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-01-75857

CLIMATE CONTROL OF KENTUCKY; HON. JAMES L. KERR, ADMINISTRATIVE LAW JUDGE; AND THE WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ACREE, CAPERTON AND THOMPSON, JUDGES.

CAPERTON, JUDGE: The Appellant, Climate Control of Kentucky (hereinafter Climate Control), appeals from the June 23, 2009, decision of the Workers' Compensation Board, vacating the decision of Administrative Law Judge (ALJ) James L. Kerr, rendered on reopening dated January 9, 2009, and amended by order on petition for reconsideration, issued February 16, 2009, in which the ALJ granted Muthler an award of income benefits utilizing the 2-multiplier pursuant to Kentucky Revised Statutes (KRS) 342.730(1)(c)(2).[1] Said benefits were granted retroactively prior to the date of the motion to reopen, which Climate Control asserts was error.

The Appellee, Tom Muthler, responds and cross-appeals, concurring with Climate Control that the ALJ had jurisdiction over the claim, but also asserting said jurisdiction was concurrent with that of the circuit court. Further, Muthler argues that the Board and ALJ were correct in their determination that

[1] KRS 342.730(1)(c)(2) provides that: 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.

Muthler could be awarded enhanced benefits prior to the date of the motion to reopen. After a thorough review of the record, the applicable law, and the arguments of the parties, we hereby reverse in part, affirm in part, and remand for additional proceedings not inconsistent with this opinion.

Muthler, a licensed journeyman plumber, became employed by Climate Control in March of 2001. Muthler was assigned to perform plumbing work and to oversee all of the company's jobs in Louisville. Muthler sustained a work-related injury on August 23, 2001. At that time, after rolling pieces of concrete into the small bucket of a loader, Muthler complained of a pulled muscle, accompanied by pain in the back and right leg for the following 48 hours. On August 25, 2001, Muthler was treated by an immediate care physician, who diagnosed an external hemorrhoid, which was lanced. Muthler was subsequently seen by his family physician, who provided daily treatment for a two-week period. A colonoscopy was ordered, but failed to demonstrate the suspected hemorrhoid.

Subsequent to the colonoscopy, Muthler was advised that he had developed a blood clot behind the knee on his right leg, which was swollen at the time. Muthler was hospitalized and developed blood clotting issues, for which he was prescribed the use of Coumadin indefinitely. He was also advised to receive regular ultrasound testing. Muthler ultimately developed deep vein thrombosis, which was found by the ALJ to be causally related to the injury.

Muthler remained off-work following the injury through October 12, 2001, and TTD benefits were paid by Climate Control from September 1, 2001,

through October 12, 2001. Muthler returned to work at Climate Control on or about October 13, 2001. It is undisputed that at that time, Muthler was earning the same or greater average weekly wage as at the time of injury. He continued to work until the plumbing department was closed later that month. Muthler then received unemployment benefits for a short period of time, after which time he performed a few "side jobs" and subsequently started his own business, T&S Services, in April of 2003. Muthler continues to operate and earn wages from T&S Services at present. Muthler asserts that he has not earned the same or greater average weekly wage as when working at Climate Control since March 1, 2002.

Muthler filed the instant claim on September 8, 2003. It was stipulated by the parties during the original proceedings that at the time of the August 2001 injury, Muthler was earning an average weekly wage of $653.53.

This matter initially came before ALJ Donna Terry on issues of whether the injury was work-related and causation with respect to Muthler's deep vein thrombosis and associated complaints. ALJ Terry found that the deep vein thrombosis and associated problems were the result of treatment rendered for the August 23, 2001, back strain, leg pain, and swelling. In addressing extent and duration, ALJ Terry accepted the 25% impairment rating assessed by Dr. Warren Bilkey. Concerning application of the 2-multiplier, ALJ Terry ruled as follows:

> [B]ased upon Mr. Muthler's testimony that he earns a lesser wage than the stipulated $653.53 earned on the date of injury, he is entitled to twice the weekly benefits

> pursuant to KRS 342.730(1)(c). In the event that Mr. Muthler returns to an average weekly wage of at least $653.53 per week, benefits shall be reduced accordingly to $114.30 per week pursuant to statute. Therefore, his permanent partial disability benefits shall be calculated as follows:
>
> $397.55 (maximum for 2001) x 25% x 1.15 factor = $114.30
> $114.30 x 2 = $228.60
>
> The Plaintiff, Tom Muthler shall recover from the Defendant Climate Control and/or its insurance carrier, temporary total disability benefits in the sum of $435.69 per week from September 1, 2001 through October 12, 20021, and thereafter, the sum of $228.60 per week from October 12, 2001 and continuing for a period not to exceed 425 weeks, together with interest at the rate of 12% per annum on all due and unpaid installments of such compensation . . .
>
> In the event that Mr. Muthler's average weekly wage equals or exceeds $653.53, weekly benefits shall be reduced to $114.30 per week for the remainder of the weeks at or above said wage level.

ALJ Terry also awarded Muthler reasonable and necessary medical expenses under the Act.

Following this initial award, Climate Control filed a petition for reconsideration, arguing that Muthler's testimony concerning his wage level, upon which the ALJ's award of the 2-multiplier was based, was vague and, further, pointing out that Muthler failed to provide promised specific information from his 2002 and 2003 tax returns. The ALJ, after considering the petition, amended the original award, stating:

> Both parties obviously want to reach the appropriate award supported by objective evidence. To that end, the Administrative Law Judge finds that Paragraph One of the Award shall be amended to provide for payment of temporary total disability benefits in the sum of $435.69 per week from September 1, 2001 through October 12, 2001, and thereafter, the sum of $114.30 per week commencing October 12, 2001, and continuing for a period not to exceed 425 weeks, together with interest at the rate of 12% per annum on all due and unpaid income benefits.
>
> In addition, since Plaintiff initially returned to work at an average weekly wage equal to or greater than $653.53, he is entitled to enhanced benefits pursuant to KRS 342.730(1)(c)(2) for any period of cessation of that employment, either temporary or permanent, for any reason, with or without cause. During any cessation of that employment, weekly benefits of $114.30 shall be doubled to $228.60.
>
> Plaintiff shall, within ten days following the date of this award, tender a copy of his federal and state tax returns for the years 2002 and 2003 for assistance in calculating said benefits, and shall provide proof, if requested in the future, of continuation of said wage level.
>
> Except as hereinabove amended, the Opinion and Award remains as rendered.

Neither party appealed from the ALJ's ruling and the award concerning the 2-multiplier became final. Thereafter, on June 21, 2004, Muthler filed copies of his 2002 federal and state tax returns, indicating that he received income in the amount of $13,765.00 for that year.

Subsequently, on November 15, 2005, Muthler filed a motion to reopen his claim, asserting that Climate Control had refused to enhance his award of income benefits pursuant to KRS 342.730(1)(c)(2), as ordered by ALJ Terry at

the time of the original decision. The reopening was assigned to ALJ James Kerr for adjudication and a determination as to whether Muthler was in fact earning less than he did at the time of the injury.

On January 26, 2006, Climate Control filed a Notice of Claim Denial, citing as its basis that Muthler was not entitled to enhanced benefits at that time. Thereafter, on March 1, 2007, Climate Control filed a separate medical fee dispute contesting liability for costs associated with the treatment of Muthler's ongoing low back complaints. On March 3, 2007, Climate Control filed, without objection, an amended Form 111 Notice of Claim Denial, stating that Muthler had failed to demonstrate entitlement to enhanced benefits pursuant to any provision of KRS 342.730 or any other statutory or regulatory provision.

Following litigation which consisted of the submission of recent medical reports; Muthler's testimony; recent tax returns for 2005, 2006, and 2007; and the testimony of CPA James Bentley, the accountant in charge of taxes and bookkeeping for Muthler and T&S Services, ALJ Kerr rendered a decision on January 9, 2009. Therein, ALJ Kerr held that Muthler's lumbar spine treatment was unrelated to his original work injury and, accordingly, found that Climate Control was not responsible for the costs of such treatment. That portion of the ALJ's decision was not appealed by Muthler.

With respect to the issue of the 2-multiplier, ALJ Kerr held that Muthler was entitled to enhancement of the original award of income benefits. In so ruling, the ALJ reviewed the tax returns filed by Muthler and concluded that

Muthler had legally demonstrated that his income since his separation from Climate Control was less than his average weekly wage of $653.53 at the time of the injury. Accordingly, the ALJ found that Muthler was entitled to the 2-multiplier on the date that his employment at the higher rate ceased.

Climate Control filed a Petition for Reconsideration, arguing that the award should be amended to indicate that enhanced benefits should start as of the date of Muthler's motion to reopen, not the date that employment ceased. Thereafter, on February 16, 2009, ALJ Kerr issued an amended award, changing the start date for enhanced benefits to March 1, 2002, a date apparently arrived at by Muthler's concession that he made equal or greater wages until that date.

Climate Control subsequently appealed the amended award to the Workers' Compensation Board with respect to the start date for enhanced benefits. In an opinion rendered June 23, 2009, the Board vacated both of ALJ Kerr's orders, dismissing them for lack of jurisdiction. In so doing, the Board found that Muthler's motion to reopen requesting enhanced benefits was "nothing more than an attempt to enforce the award of the 2-multiplier granted by the original ALJ at the time of the original proceedings."

The Board also found that the order issued by ALJ Terry upon Climate Control's petition for reconsideration did not rescind her original finding of fact that Muthler was making wages below those earned at the time of the injury. Accordingly, the Board ruled that both the original and amended awards of ALJ Terry specifically ordered Climate Control to pay income benefits enhanced

by the 2-multiplier, and that the issue was *res judicata*. Additionally, the Board found that ALJ Terry's order requiring Muthler to file tax returns was not necessary to prove his post-injury wage, noting that they were simply required for aid in calculating said benefits.

The Board also stated that Climate Control had the burden of proof with respect to Muthler's post-injury wage level following the time that ALJ Terry's award of May 19, 2004, became final. Finding that the award was final, and finding that Climate Control was at all times obligated to pay enhanced benefits, the Board found that the proper forum for the action was in the form of an enforcement action in circuit court.

Nevertheless, the Board ultimately did address the merits of the issue before it, namely, the date that benefits should accrue on a motion to reopen for enhancement pursuant to KRS 342.730(1)(c)(2). The Board found that KRS 342.730(1)(c)(2) can be read to suggest that an ALJ is precluded from ordering a double benefit to commence prior to the date of a motion to reopen. The Board nevertheless, after weighing the policy issues involved, was ultimately unable to conclude that an ALJ was without authority to award benefits payable prior to the date of the motion to reopen.

The Board did, however: find that if the original award of ALJ Terry did not intend for KRS 342.730(1)(c)(2) to be immediately applied, it would be error for ALJ Kerr to retroactively award double benefits on reopening beyond the date of the May 19, 2004, order of ALJ Terry on petition for reconsideration; and

found that, as Muthler did not appeal that order, it would constitute a bar to relitigation on reopening of any issue previously decided, namely Muthler's entitlement to receive enhanced benefits for the period spanning from March 1, 2002, through the time of the original 2004 award.

It is from the June 23, 2009, order of the Board vacating the orders of ALJ Kerr that Climate Control now appeals to this Court, and from which Muthler responds and cross-appeals. Climate Control argues the following issues on appeal: (1) whether the ALJ had the jurisdiction and authority to issue an opinion in the reopening; (2) whether Muthler was entitled to enhanced benefits; (3) the appropriate start date of any award for enhanced benefits; and (4) whether the Workers' Compensation Board erred in vacating the entire opinion of the ALJ. We address each of these issues in turn.

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 pursuant to that standard.

As its first basis for appeal, Climate Control argues that the ALJ had the jurisdiction and authority to issue an opinion on the issues raised by the parties in the reopening, namely, entitlement to enhanced benefits and the medical fee dispute concerning the lumbar spine. We address the latter of these issues first.

During the course of reopening, Climate Control filed a medical fee dispute regarding compensability of the ongoing treatment that Muthler was receiving for his lumbar spine, asserting that it was unrelated to his original 2001 work injury. This issue was litigated by the parties and ALJ Kerr ultimately concluded that Climate Control was not responsible for the costs of such treatment. That decision was not appealed by Muthler.

During the subsequent appeal to the Board, no argument was made that ALJ Kerr erred in his findings concerning the treatment for the lumbar spine and, in its opinion, the Board did not address the medical fee dispute. Nevertheless, in vacating ALJ Kerr's January 9, 2009, order, the Board also vacated his findings concerning the medical fee dispute. Pursuant to 803 Kentucky Administrative Regulations (KAR) 25:012, Section 6(c), the ALJ had clear and proper authority to decide the medical fee dispute. Accordingly, we find that it was error for the Board to vacate that portion of the order and hold that it should be reinstated.

With respect to whether the ALJ had jurisdiction to decide the issues pertaining to the 2-multiplier, both parties argue that the ALJ had the authority to decide the issues presented to him. Having reviewed the record, the arguments of the parties, and the applicable law, we are compelled to agree. In finding that the proper venue for this dispute was as an enforcement action in circuit court, the Board made what we believe was an erroneous interpretation of ALJ Terry's order following the petition for reconsideration. It was the opinion of the Board that ALJ

Terry, both in her initial and amended order, found that Muthler was entitled to the enhancement of the 2-multiplier and, since neither party appealed the award, it became *res judicata* and enforceable only by action in circuit court.

In reviewing the order, we are not persuaded that this was the case. We are of the opinion that in issuing the amended award of May 19, 2004, ALJ Terry intended to reverse the opinion rendered concerning the 2-multiplier in the initial award. While stating that Muthler's testimony "could" be interpreted to mean that he was earning less than he did at the time of the injury, the ALJ specifically found in her amended order that the parties wanted an appropriate award based on *objective* evidence. The evidence specifically ordered to be presented included Muthler's tax returns from 2002 and 2003, as well as ongoing proof of continuing wage level if so requested.

Our review of ALJ Terry's amended order reveals no finding of fact with regard to Muthler's post-injury wage. Indeed, it clearly appears to this Court that ALJ Terry intended that Muthler provide the information necessary to determine whether or not he was entitled to that enhancement. As a result, we disagree with the Board's finding that it was the burden of Climate Control to prove Muthler's post-injury wage level. We believe that the burden in that regard remained with Muthler and that, accordingly, it was an issue properly to be determined by ALJ Kerr after a thorough review of the objective evidence presented upon reopening.

Had ALJ Terry not intended to rescind her original finding concerning Muthler's wages, we believe that she would have overruled the petition for reconsideration and left the original award fully intact. As she did not do so, we are of the opinion that she intended to alter her findings with respect to entitlement to enhanced benefits, and to provide that such benefits be paid only upon such time as Muthler provided objective evidence to support such entitlement. Accordingly, we believe that an enforcement action in circuit court was not the appropriate forum for litigation of this dispute, and would have been so only in the event that Climate Control failed to comply with payment of an award of enhanced benefits expressly made by the ALJ. In that enforcement of the award was not the case in this instance, we believe that the dispute was properly before ALJ Kerr. We reverse the Board's order to vacate the decisions of ALJ Kerr accordingly.

In so doing, we briefly address Muthler's arguments on the jurisdictional issue. Muthler argues that there was concurrent jurisdiction between the ALJ and the circuit court. We disagree. We believe enforcement actions pursuant to KRS 342.305 to be appropriate only when there are no material issues remaining to be decided. Under the amended award of ALJ Terry, it remained to be determined what weeks, if any, Muthler demonstrated entitlement to enhanced benefits. That was an issue which required the submission of objective evidence by the parties, evidence which was indeed submitted to ALJ Kerr for review, and for a determination on the merits. For the foregoing reasons, we believe these

issues to have been properly before the ALJ, and we reinstate the orders of the ALJ accordingly.

Having so found, we now turn to the second issue of dispute between the parties, namely, the appropriate commencement date for the award of enhanced benefits. As noted, ALJ Kerr found that Muthler was entitled to enhanced benefits effective March 1, 2002. Climate Control argues that the appropriate start date for increased benefits was as of the date of the motion to reopen on November 15, 2005.

> Nevertheless, the Board ultimately did address the merits of the issue before it, namely, the date that benefits should accrue on a motion to reopen for enhancement pursuant to KRS 342.730(1)(c)(2). The Board found that KRS 342.730(1)(c)(2) can be read to suggest that an ALJ is precluded from ordering a double benefit to commence prior to the date of a motion to reopen. The Board nevertheless, after weighing the policy issues involved, was ultimately unable to conclude that an ALJ was without authority to award benefits payable prior to the date of the motion to reopen.
>
> The Board did, however, find that if the original award of ALJ Terry did not intend for KRS 342.730(1)(c)(2) to be immediately applied, it would be error for ALJ Kerr to retroactively award double benefits on reopening beyond the date of the May 19, 2004 order of ALJ Terry on petition for reconsideration, finding that as Muthler did not appeal that order, it would constitute a bar to relitigation on reopening of any issue previously decided, namely Muthler's entitlement to receive enhanced benefits for the period spanning from March 1, 2002 through the time of the original 2004 award.

Ultimately, we concur with the Board that the interpretation of the law asserted by Climate Control neglects the general concerns of common sense and

policy which we believe are important in a consideration of this issue. Were we to adopt the statutory construction asserted by Climate Control, this would leave claimants no option but to file a motion to reopen immediately upon cessation of qualifying employment in order to ensure that they received the full benefit provided by the statute. This would serve not only to create excessive and potentially unnecessary litigation, but would also discourage those claimants who might otherwise make a good faith attempt to resolve these issues informally with their employers.

Having reviewed the applicable law, we are not persuaded that KRS 342.125 prohibits conforming award payments to the requirements of KRS 342.730(1)(c)(2) in a reopening authorized by KRS 342.730(1)(c)(4) prior to the date the motion to reopen was filed. Indeed, KRS 342.730(1)(c)(2) clearly provides that:

> 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. (Emphasis added).

In reviewing the language of the statute on this issue, it is the opinion of this Court that KRS 342.730(1)(c)(2) could be interpreted to provide for payment of benefits during *any period* of cessation of employment and not simply from the date the motion to reopen was filed, and we so find.

While KRS 342.125(4) serves to create some ambiguity in providing that "any change in the amount of compensation shall be ordered only from the date of filing the motion to reopen," we are of the opinion that this provision is intended to apply to reopenings in general, and not to a situation as in the case in the matter *sub judice*. It is this Court's opinion that KRS 342.730(1)(c)(2) clearly provides the parameters within which the enhancement is to occur, namely, during any period of cessation of the qualifying employment. We believe the specificity of this statute is controlling. Indeed, our courts have repeatedly held that when two statutes address the same subject matter, one broadly and generally and the other specifically, the specific statute will prevail. *See Destock No. 14, Inc. v. Logston*, 993 S.W.2d 952 (Ky. 1999); and *Land v. Newsome*, 614 S.W.2d 948 (Ky. 1981).

In the matter *sub judice*, the original opinion and award issued by ALJ Terry included a finding that Muthler returned to work at an average weekly wage equal or greater to that which he earned at the time of the injury. Accordingly, on reopening, the ALJ was, as is allowed by statute, to conform the original award to the requirements of KRS 342.730(1)(c)(2), as authorized by KRS 342.730(1)(c)(4). Accordingly, we do not find that ALJ Kerr erred in awarding benefits prior to the date of reopening.

Having so found, we are nevertheless of the opinion that the ALJ did err in awarding benefits prior to the date of ALJ Terry's Order on Reconsideration dated May 19, 2004. For the reasons previously stated, we are of the opinion that ALJ Terry, in issuing the amended order, made clear that she did not intend for

KRS 342.730(1)(c)(2) to be immediately applied, but rather, that it should be applied only for such time periods as to which Muthler could make an objective showing of entitlement.

At that time, Muthler did not seek further review, allowing the May 19, 2004, order to become final and non-appealable. We believe that this constitutes a bar to any relitigation on reopening of an issue previously decided, namely, Muthler's entitlement to receive double benefits for the period from March 1, 2002, through the time of the 2004 award. Thus, we are of the opinion that while ALJ Kerr had the jurisdiction to preside over this dispute, and the authority to award benefits prior to reopening, such enhancement could only properly begin following the order on reconsideration dated May 19, 2004.

In so finding, we briefly address the arguments made by Climate Control in its response to the cross-petition filed by Muthler. Therein, Climate Control makes what appears to be a new argument, one not addressed in its initial brief to this Court, nor, as best this Court can discern, made to the ALJ or the Board. Specifically, Climate Control asserts that pursuant to the recent decision of our Kentucky Supreme Court in *Chrysalis v. Tackett*, 283 S.W.3d 671 (Ky. 2009), KRS 342.730(1)(c)(2), double income benefits are permitted only when an employee's wages cease for a reason related to the disabling injury.

We find this argument to be without merit for two reasons. First, this opinion had not yet been rendered at the time ALJ Kerr issued his January 2009 award. Accordingly, he could not possibly have made a determination as to

entitlement to benefits on that basis. We will not review his award retroactively in light of this new caselaw. Secondly, and of equal importance, this Court will not address for the first time on appeal arguments which were not made below. Accordingly, we decline to reverse the award of the ALJ on this basis.

Wherefore, for the foregoing reasons, we hereby reverse the decision of the Workers' Compensation Board vacating the opinion of ALJ Kerr and remand for reinstatement of an award not inconsistent with the findings rendered herein.

ALL CONCUR.

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