

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000580-WC

ROGER W. TUDOR

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-79389

INDUSTRIAL MOLD & MACHINE CO., INC.;
RICHARD M. JOINER, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

KELLER, JUDGE: Roger W. Tudor (Tudor) appeals from the opinion of the Workers' Compensation Board (the Board) reversing the opinion and award of the Administrative Law Judge (the ALJ). The sole issue on appeal is whether the ALJ correctly calculated Tudor's benefits. Having reviewed the record, we affirm.

FACTS

At the outset, we note that the parties, the ALJ, and the Board use the terms "impairment," "impairment rating," and "whole person impairment," as well as simple numerical percentages when describing the various assessments of impairment ascribed to Tudor. In this opinion, unless otherwise noted, we use the term "impairment" when referring to a percentage of impairment from the American Medical Association *Guides to the Evaluation of Permanent Impairment* (the *AMA Guides*).

The facts, at least so far as this appeal is concerned, are not in dispute. Tudor began to experience back pain in the early 1990s. His pain gradually radiated into his hip and right leg and, in August 2008, he underwent low back surgery. After recovering from his surgery, Tudor returned to unrestricted work activity, working until August 2009, when he suffered a back injury while working at Industrial Mold & Machine Co., Inc. (Industrial Mold). Following that injury, Tudor underwent a second surgery, again returning to unrestricted work activity after recovering from surgery. Industrial Mold contested Tudor's entitlement to benefits, and he filed a claim.

During litigation, the parties presented evidence from Tudor and several physicians. The ALJ stated that he was persuaded by Dr. Travis and found that Tudor had "a pre-existing impairment of 9%. The injury of August 31, 2009 would have produced a 10% impairment which, when combined with the pre-

existing 9%, produces a total impairment of 18%."¹ Citing to *Transport Motor Express v. Finn*, 574 S.W.2d 277 (Ky. 1978), the ALJ then stated, somewhat inconsistently, that "[f]or the August 31, 2009 injury, I determine the whole of the disability to be 18%." Finally, the ALJ determined the total benefit payable for an 18% impairment and then excluded the benefit amount attributable to the pre-existing 9% impairment. Thus, in making his final award, the ALJ made three calculations. First, he calculated the value of Tudor's 18% total combined impairment as follows: \$509.50 (sixty-six and two-thirds of Tudor's average weekly wage) x 18% (the total combined impairment) x 1 (the factor from Kentucky Revised Statutes (KRS) 342.730(1)(b)) = \$91.71. The ALJ then calculated the value of Tudor's 9% pre-existing impairment as follows: \$509.50 x 9% x .85 (the factor from KRS 342.730(1)(b)) = \$38.98. Finally, the ALJ subtracted the value of the pre-existing impairment from the value of the total combined impairment and arrived at an award of \$52.73 per week. Industrial Mold timely filed a petition for reconsideration arguing that the ALJ had incorrectly calculated Tudor's benefit rate. The ALJ summarily denied Industrial Mold's petition.

Industrial Mold then appealed to the Board. Before the Board, as it does herein, Industrial Mold stated that no witness assessed an 18% impairment. However, Industrial Mold conceded that Dr. Travis assessed a 9% impairment for Tudor's pre-injury surgery and a 9% impairment for his post-injury surgery. Based

¹ It appears that the ALJ used the Combined Values Chart in the *AMA Guides* to make this calculation.

on its assessment of the evidence and its interpretation of the ALJ's opinion, Industrial Mold argued before the Board, and argues herein, that the ALJ incorrectly included in his calculation the 9% impairment associated with Tudor's pre-injury surgery. Tudor argued before the Board, as he does herein, that the ALJ correctly calculated the award. As noted above, the Board agreed with Industrial Mold and reversed the ALJ, remanding for entry of an award based on a 9% impairment. This appeal followed.

STANDARD OF REVIEW

The issue raised by Tudor is one of law, therefore we review the Board's opinion *de novo*. *Bowerman v. Black Equipment Co.*, 297 S.W.3d 858, 866 (Ky. App. 2009).

ANALYSIS

At the outset, we note that there are several discrepancies in the record. As noted above, the ALJ stated at one point in his opinion that Tudor's injury would have produced a 10% impairment. However, none of the physicians assessed such an impairment, and the ALJ appears to have ultimately based his opinion on a finding that Tudor had a 9% impairment related to the work injury.

Industrial Mold states that no physician assessed a total impairment of 18%; however, Dr. Travis, in his August 23, 2010, report assigned Tudor a total impairment of 18%, which he apportioned equally between the two surgeries. This final opinion by Dr. Travis followed a somewhat twisted and confusing path through several reports wherein he opined that Tudor has impairments related to

the first surgery ranging from 9% (August 23, 2010 report) to 11% (August 3, 2010 report); impairments related to the second surgery ranging from 9% (August 23, 2010 report) to 12% (August 3, 2010 report); and total impairments ranging from 18% (August 23, 2010 report) to 23% (August 3, 2010 report).

Despite these discrepancies, the parties do not contest the ALJ's findings that Tudor has an impairment of 9% related to the pre-injury surgery and an impairment of 9% related to the injury and post-injury surgery. Therefore, we accept those findings as correct.

Having accepted the ALJ's findings regarding Tudor's impairments, and after reviewing the record and relevant law, we agree with the Board that the ALJ incorrectly calculated Tudor's benefit rate. The calculation of benefit rate depends, in pertinent part, on several factors. First, the ALJ must determine, as he did herein, that the claimant suffered a work-related injury. KRS 342.0011(1).

Next, the ALJ must determine if the claimant has any permanent impairment rating, which is defined as the "percentage of whole body impairment caused by the injury . . . as determined by the 'Guides to Evaluation of Permanent Impairment' . . ." KRS 342.0011(35) (emphasis added). Based on this statutory definition, "permanent impairment rating" differs from "impairment" because a "permanent impairment rating" must be the result of a work injury.

Once the ALJ has determined that a claimant has a permanent impairment rating, he must calculate the claimant's "permanent disability rating." A permanent disability rating is calculated by multiplying the permanent

impairment rating by the appropriate factor from KRS 342.730(1)(b). KRS 342.0011(36). Thus, a permanent disability rating must be based on a permanent impairment rating, which must be a percentage of impairment caused by the injury. It is when he analyzed these two factors that the ALJ went astray.

The ALJ found that Tudor "has a permanent disability rating of 18%, which is 18% impairment under the *AMA Guides* multiplied by 1.0, the factor contained in KRS 342.730." That finding is unsupported by the record and inconsistent with the ALJ's finding that half of Tudor's 18% impairment pre-existed the injury. Once the ALJ determined that 9% of Tudor's impairment pre-existed the work injury, that percentage of impairment could not be included in calculating Tudor's permanent impairment rating or permanent disability rating. Since only 9% of Tudor's impairment was caused by the work injury, the ALJ could only use that 9% impairment in calculating Tudor's permanent impairment rating and his permanent disability rating.

The ALJ also erred when he found that "[i]mmediately prior to the injury of August 31, 2009, Roger W. Tudor had a permanent disability rating of 7.65% which is 9% impairment under the *AMA Guides* multiplied by 0.85, the factor contained in KRS 342.730." The 9% impairment Tudor had prior to the work injury was not caused by the work injury; therefore, it cannot be the basis for a permanent impairment rating and it cannot be used to calculate a permanent disability rating.

Based on the preceding errors, the ALJ erred in calculating Tudor's benefit rate. KRS 342.730(1)(b) provides that income benefits for permanent partial disability shall be determined by multiplying

sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740, . . . by the permanent impairment rating caused by the injury or occupational disease as determined by the "Guides to the Evaluation of Permanent Impairment," times the factor set forth in the table that follows:

AMA Impairment	Factor
0 to 5%	0.65
6 to 10%	0.85
11 to 15%	1.00
16 to 20%	1.00
21 to 25%	1.15
26 to 30%	1.35
31 to 35%	1.50
36% and above	1.70

(emphasis added).

As we previously noted, a "permanent impairment rating" must, by definition, be caused by an injury. Therefore, the statutory statement that a calculation is to be based on a "permanent impairment rating caused by the injury" is redundant. However, that redundancy, if anything, serves to emphasize the legislative intent that injured workers should only be compensated for the percentage of impairment that is related to a work injury. Therefore, the ALJ incorrectly included in his calculation the 9% impairment that pre-existed the work injury.

Finally, we note that the ALJ's reliance on *Transport Motor Express v. Finn*, 574 S.W.2d 277 (Ky. 1978), to support his calculation is misplaced. In *Finn*, the old Board awarded Finn a total disability, carving out 50% of that disability as pre-existing. On appeal, the Special Fund and Transport Motor Express disputed the benefit calculations. This Court determined that Finn was entitled to receive benefits at the rate of \$71.94 per week, with the Special Fund and Transport Motor Express each paying half. The Supreme Court of Kentucky reversed, noting that this Court's calculation resulted in an award that amounted to 88.8% of the maximum benefit rate of \$84.00. The Supreme Court reasoned that, if 50% of Finn's disability was excluded as non-compensable, awarding him 88.8% of the maximum benefit rate made that exclusion meaningless. *Id.* at 281. In order to effectuate the exclusion, the Court determined that Finn should be compensated at the rate of \$42.00 per week, or 50% of the maximum rate.

Setting aside the fact that KRS 342, *et seq.* has been significantly amended numerous times since the Supreme Court decided *Finn*, the Court's holding in *Finn* is contrary to the ALJ's award, not supportive of it. The Court held that Finn was only entitled to compensation at a rate equal to his percentage of work-related disability. The ALJ, by including non-compensable impairment in his calculation, awarded Tudor compensation at a rate that exceeded his entitlement to benefits. Thus the ALJ violated the underlying principle set forth in *Finn* and in the current version of KRS 342 *et seq.* that an injured employee is

entitled to be compensated only for that portion of his impairment that is related to the work injury.

CONCLUSION

For the foregoing reasons, we affirm the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Daniel Caslin
Owensboro, Kentucky

BRIEF FOR APPELLEE:

David L. Murphy
Louisville, Kentucky