

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002610-WC

STARDUST CRUISERS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-94-43890

JEREMY DERRYBERRY;
ROBERT L. WHITAKER, DIRECTOR
OF SPECIAL FUND;
HONORABLE JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: EMBERTON, GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. Stardust Cruisers (Stardust) appeals from an order rendered by the Board on September 18, 1998, which affirmed an opinion and order entered by the Administrative Law Judge (ALJ) on April 24, 1998, which awarded temporary total disability (TTD) to Jeremy D. Derryberry (Derryberry). We affirm.

Derryberry was employed by Stardust as a finish carpenter responsible for installing trim on houseboats. He was injured on November 9, 1994, when he fell through an open hatchway and landed on his back. Stardust voluntarily paid TTD

in the amount of \$133.34 per week from November 10, 1994 through January 31, 1995. Pursuant to the opinion and award entered by the ALJ, Stardust was ordered to pay TTD benefits in the amount of \$123.06 per week from November 10, 1994 through April 8, 1996, with Stardust being permitted to take credit for any compensation already paid. Stardust next appealed to the Board arguing that the ALJ's decision to award TTD was not supported by substantial evidence. The Board affirmed and this appeal followed.

Stardust argues on appeal that the ALJ's award of TTD is contrary to the law. Stardust maintains that under W. L. Harper Construction Co. v. Baker, Ky. App., 858 S.W.2d 202 (1993), the ALJ must consider not only when maximum medical improvement was reached, but also if the underlying condition had stabilized to the point that Derryberry should have been able to return to work. While Stardust's argument may or may not have merit, we note that it was not raised before the Board. Hence, it is not properly preserved for appeal and we will not consider it. Lost Mountain Mining v. Fields, Ky. App., 918 S.W.2d 232, 233 (1996).

Stardust also argues that the ALJ's decision to award TTD is not supported by substantial evidence. Having reviewed the parties' briefs on appeal and the record, we feel that we cannot improve on the Board's opinion on this issue and adopt the following portion of the Board's opinion as our own:

Derryberry was injured on November 9, 1994, while working for Stardust in trimming a houseboat. His right foot became hung and he lost his balance, falling onto the hull of the houseboat. He developed low back pain and sought medical attention from Dr. Carol

Peddicord. He participated in physical therapy and other conservative medical treatment. Prior to his injury, he had some college and, during the recovery process and upon the suggestion of Dr. Peddicord, he returned to taking college courses. He continued to experience pain into 1996. Derryberry altered some of his recreational activities such as avoiding playing basketball and baseball.

Dr. Peddicord, the treating physician, testified that Derryberry was a compliant patient and appeared to do everything she asked. She believed he had a small herniated disk which was identified on MRI. She prescribed medication as well as physical therapy. She did not believe he would be able to return to heavy employment and, specifically, based upon his description as well as her own experience with other employees of Stardust, certainly could not return to work there. Dr. Peddicord testified that by May of 1995 she believed that he had attained approximately 60% recovery. By October 1995, Derryberry was at 90% of recovery and by April 1996, he was at maximum medical improvement. She acknowledged that probably in October of 1995 he would be able to perform light and sedentary labor and certainly by April of 1996 he could perform medium, light and sedentary labor, although she would continue to recommend against heavy work. Derryberry had undergone physical therapy in early 1995 and then underwent a second course of physical therapy in late 1995.

Dr. John Purvis believed Derryberry was exhibiting symptom magnification and appeared to be morose and depressed. He felt that there was probably some conversion reaction. He found no evidence in October of 1995 of any injury and was of the opinion that Derryberry was certainly at maximum medical improvement then and probably before that time. He would recommend no restrictions.

Dr. Michael Best also believed there was evidence of symptom magnification and no significant clinical findings. He would assign no impairment and believed Derryberry had reached maximum medical improvement by

March of 1995 based upon his review of Dr. Purvis' records.

Debbie Heazlitt, a case manager with Intracorp, submitted a "vocational" evaluation into evidence. She believed that there were employment opportunities in the local area at a minimum wage level that were available to Derryberry.

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[T]he issue boils down to a review of Dr. Peddicord's testimony and whether that would support a finding of temporary total disability through April 1996 within the definition as it is set out in W. L. Harper vs. Baker. We believe that it does. Dr. Peddicord attempted to provide realistic and candid responses to her evaluation of Derryberry. She did not believe he reached maximum medical improvement until April 1996. She did believe he had the physical capacity to perform some light and sedentary work prior to that time although as late as October 1995 he was "admitted with exacerbation of his lumbar disk disease, muscle spasms. He was put on muscle relaxers." Even into March of 1996 he continued with physical therapy. Since the ALJ relied upon Dr. Peddicord and she did not consider Derryberry to be at maximum medical improvement until April 1996, the issue is whether his recovery had stabilized to a degree that he could participate in active gainful employment. While we may have concluded otherwise, since he continued to participate in physical therapy, continued to see a physician, was participating in attempting to better himself vocationally, it was certainly not unreasonable for the ALJ to infer that within his restrictions and within his experience and ability, Derryberry was not capable of performing active gainful employment during the period of October 1995 to April 1996.

The opinion and order of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James G. Fogle

BRIEF FOR APPELLEE, SPECIAL
FUND:

Louisville, KY

Benjamin C. Johnson
Louisville, KY

No brief for appellee, Jeremy
D. Derryberry