

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002734-WC

RONNIE A. BALL

APPELLANT

V. PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-96450

BIG ELK CREEK COAL CO., INC.; THOMAS
A. NANNEY, Administrative Law Judge;
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

* * * * *

BEFORE: GUDGEL, Chief Judge; BUCKINGHAM and KNOX, Judges.

GUDGEL, CHIEF JUDGE: This matter is before us on a petition for review of an opinion of the Workers' Compensation Board (board), affirming an opinion and award of an Administrative Law Judge (ALJ). We have reviewed both the petition and the response to the petition, the board's opinion, the ALJ's opinion, and the relevant portions of the board's record. We find ourselves in complete agreement with the analysis set out in the board's well-written opinion. Therefore, we deem it appropriate to adopt the board's opinion by Board Member Larry Greathouse as our own, as follows:

Ronnie A. Ball ("Ball") appeals from an Opinion and Award rendered August 6, 1998 by Hon. Thomas A. Nanney, Administrative Law Judge ("ALJ"), and from his order on petition for reconsideration dated August 24, 1998. The ALJ determined that Ball, who injured his low back on February 1, 1997 while employed by Big Elk Creek Coal Co., Inc. ("Big Elk"), suffered a 10% impairment to the body as a whole under the AMA Guidelines, DRE Category III. The ALJ further determined that Ball returned to work for another employer, Leslie Resources, at a weekly wage equal to or greater than his average weekly wage at the time of injury. Accordingly, the ALJ, in accord with KRS 342.730(1)(c)2., reduced Ball's weekly benefits for permanent partial disability by one-half for each week during which his employment is sustained. On appeal, Ball contends the ALJ erred in his interpretation of the statutory language in KRS 342.730(1)(c)2., and in KRS 342.730(1)(b).

The General Assembly, during the 1996 (1st. Extra. Sess.) substantially amended provisions of Kentucky's Workers' Compensation Act. The Legislature, in amending the provision for determination of income benefits for disability, enacted KRS 342.730(1)(b) which became effective on December 12, 1996, and is applicable to Ball's claim of injury which occurred on February 1, 1997. That statutory provision, in relevant part, provides:

- (b) For permanent partial disability, 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, multiplied by the permanent impairment rating caused by the injury or occupational disease as determined by "Guides to the Evaluation of Permanent Impairment," American Medical Association, latest edition available, times the factor set forth in the table that follows:

AMA Impairment	Factor
0 to 5%	0.75
6 to 10%	1.00
11 to 15%	1.25
16 to 20%	1.50
21 to 25%	1.75
26 to 30%	2.00
31 to 35%	2.25
36% and above	2.50

In this connection, the ALJ, in determination of Ball's permanent impairment rating, made the following findings of fact:

2. I am presented with three separate findings as to the functional impairment under the AM [sic] Guidelines. Dr. Templin found a 17% impairment using the Range of Motion Model. Dr. Sheridan found no impairment under the AMA Guidelines. Dr. Joseph Rapier assessed a 10% DRE Category 3 and/or in the alternative, a 20% under the Range of Motion Model.

3. The Defendant-Employer argues that Dr. Templin's assessment of impairment was incorrect in that the guidelines require that the DRE Model be used unless the diagnosis does not fall within the Diagnostic Related Estimates and a specific reason for not using the DRE model is set forth. I conclude after reading Dr. Templin's report that there is no basis for not using the DRE model. The "disagreement" plaintiff seeks to rely upon in using the Range of Motion Model is not a disagreement between two evaluating physicians, but the inability of one evaluating physician to "fit" the case into the DRE Model. This is not the case here.

Of the two remaining physicians, I am more convinced by the evidence given by Dr. Rapier. I find that plaintiff has sustained a 10% impairment to the body as a

whole based upon DRE Category 3. Dr. Rapier specifically finds evidence of some radiculopathy. I, therefore, conclude that plaintiff's disability rating under the AMA Guidelines is 10%.

Here, Ball contends that the ALJ's interpretation of KRS 342.730(1)(b) is overly narrow and that inasmuch as that section requires utilization of a permanent impairment rating as determined by the AMA Guidelines, the ALJ is free to choose any functional impairment rating assigned by a doctor, so long as the physician has utilized the AMA Guides as a "guide" only, as opposed to a strict formula, in arriving at a functional impairment rating.

The Legislature, in its amendment to KRS 342.730, and since 1987, has required impairment ratings to be determined under the Guides to the Evaluation of Permanent Impairment, American Medical Association, latest edition available. The latest edition available currently is the 4th edition of the Guides. The Guides, 4th Edition, at chapter 3, §3.3, p. 94, (AMA Guidelines) states: "The evaluator assessing the spine should use the Injury Model, if the patient's condition is one of those listed in Table 70 (p. 108). . . . If none of the eight categories of the Injury Model is applicable, then the evaluator should use the Range of Motion Model." Additionally, in §3.3 at p. 94, (AMA Guidelines), the contributors to the Guides state:

For evaluating spine impairments, past Guides editions have used a system based on assessing the degree of spine motion and assigning impairment percents according to limitations of motion. Impairment percents related to the range of motion were to be combined with percents based on diagnoses or therapeutic approaches and neurologic impairments.

The contributors to the Guides, as further stated in §3.3, p. 94, (AMA Guidelines), state:

In this edition of the Guides, the contributors have elected to use two approaches. One component, which applies especially to patients' traumatic injuries, is called the "Injury Model." This part involves assigning a patient to one of eight categories, such as minor injury, radiculopathy, loss of spine structure integrity, or paraplegia, on the basis of objective clinic findings. The other component is the "Range of Motion Model," described above and recommended in previous Guides editions.

The AMA Guidelines further provide in this section:

All persons evaluating impairments according to Guides criteria are cautioned that either one or the other approach should be used in making the final impairment estimate. If one component were used according to Guides recommendations, then a final impairment estimate using the other component usually would not be pertinent or germane. However, if disagreement exists about the category of the Injury Model in which a patient's impairment belongs, then the Range of Motion Model may be applied to provide evidence on the question.

The newer injury model has been designated under the AMA Guidelines as the "Diagnosis-Related Estimates (DRE) Model."

In the specific procedures and directions for physicians performing evaluations in §3.3f, p. 101 (AMA Guidelines), it is provided that:

6. If the physician cannot place the patient into an impairment category, or if disagreement exists about which of two or three categories to use for the patient, the physician should use the Range of Motion Model as a

differentiator, as explained in section 3.3b (p. 95, "Differentiators").

Moreover, under §3.3b, p. 99, the AMA Guidelines provide:

If the physician cannot decide into which DRE category the patient belongs, the physician may refer to and use the Range of Motion Model. . . . Using the procedures of that model, the physician combines an impairment percent based on the patient's diagnosis with a percent based on the patient's spine motion impairment and a percent based on neurologic impairment, if it is present. The physician uses the estimate determined with the Range of Motion Model to decide placement within one of the DRE categories. The proper DRE category is the one having the impairment percent that is closest to the impairment percent determined with the Range of Motion Model.

We agree with the interpretation given by the ALJ that the "disagreement" referred to in §3.3 is not a disagreement among the evaluating physicians, but the inability of the evaluating physician himself to decide into which DRE category a patient belongs. Here, Dr. Rapier was able to decide that Ball was DRE Category III, or 10%. Dr. Rapier gave the 20% impairment rating based on the Range of Motion Model only at Ball's subsequent request. Further, Dr. Rapier did not use the 20% impairment rating to decide placement within any DRE Category.

The ALJ relied on the 10% impairment rating offered by Dr. Rapier since Dr. Rapier had specifically found evidence of radiculopathy or symptoms in Ball's legs as a result of his low back injury. In reviewing the medical reports from each of the evaluating physicians, we note that Ball complained to each physician of occasional numbness, tingling or pain in his lower extremities since his low back injury. These are symptoms of radiculopathy.

Within the AMA Guidelines, DRE Lumbosacral Category III: Radiculopathy, under which Dr. Rapier determined that Ball had a 10% permanent impairment rating, the Guides state that: "The patient has significant signs of radiculopathy, such as loss of relevant reflex(es), or measured unilateral atrophy of greater than 2 cm. above or below the knee, compared to measurements on the contralateral side at the same location. . . ." Thus, we conclude that contrary to the assertion that ALJ Nanney's interpretation of what is required of an Administrative Law Judge in determination of a claimant's permanent impairment rating, the ALJ is not simply free to choose any functional impairment rating assigned by physicians unless the specific procedures and directions as contained in the Guidelines are undertaken. As the ALJ correctly noted, Dr. Templin, in his report, though he had identified one of Ball's complaints as radiculopathy in the lower extremities, made no effort to offer an impairment rating utilizing the DRE Model as directed by the AMA Guidelines.

The next argument by Ball is in connection with KRS 342.730(1)(c)2., which provides:

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 otherwise payable under paragraph (b) of this subsection shall be reduced by one-half (1/2) 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 restored to the rate prescribed in paragraph (b) of this subsection.

Ball, born August 14, 1951, completed three and one-half years of college majoring in physical education, health, and electronics. Ball had worked for approximately 18 years as a heavy equipment operator in the construction industry and in the surface mining industry. He also worked as a lineman for a power company and for a short period of time he loaded trucks for a soft drink bottling company. Ball worked for Big Elk from July 25, 1986 until February 1, 1997. His position was as a heavy equipment operator and, for the most part, he operated a dozer. He testified that he earned \$10.50 per hour and worked 58 hours each week. Ball started working following his injury with Big Elk as an end loader operator for Leslie Resources. He worked in this capacity until February of 1998 earning \$10.00 per hour. Ball testified that in February 1998, his job with Leslie Resources was switched to a drill operator which is the job he was performing on the day he testified at the hearing before the ALJ. Currently, Ball testified that he earns \$11.00 per hour. He submitted a copy of his most recent earnings statement indicating that for the pay period ending May 30, 1998, he had earned a gross pay of \$701.25 for that week.

In addition, wage records for Ball were submitted by Big Elk for three different quarters of work since Ball had been working for Leslie Resources. The ALJ noted that two out of the three quarters presented an average weekly wage in excess of the stipulated average weekly wage while he was employed by Big Elk. The ALJ further noted that at the time of hearing, Ball worked at an hourly wage which was higher than at the time he was injured. Thus, the ALJ concluded that Ball had returned to work at a weekly wage equal to or greater than the average weekly wage at the time of his injury. Further, by utilization of the mandatory reduction by one-half of the weekly benefits to which Ball was entitled, the ALJ determined his weekly award under the following calculation: $\$335.27 \times 10\%$ (permanent impairment rating) = $\$33.53 \times .5$ (impairment factor) = \$16.77 per week.

Moreover, in the award portion of his Opinion, the ALJ provided:

3. During any period of cessation of that employment, temporary or permanent for any reason, with our [sic] without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be restored at the rate prescribed in Paragraph B of Subsection 34.730(1).

Here, Ball contends that the proper methodology for applying KRS 342.730(1)(c)2., is to provide for a reduction by one-half of any particular week in which Ball's earnings, post-injury, exceed his average weekly wage at the time of his injury. Under this methodology framework, Ball reasons that since documentation of his earnings upon his return to work with Leslie Resources had been provided to the ALJ up to the time of hearing, that it was incumbent upon the ALJ to apply the reduction of one-half payment only to those particular weeks in which the claimant's wages actually exceeded his pre-injury average weekly wage of \$581.54. We disagree.

We believe the language of KRS 342.730(1)(c)2. is abundantly clear. Statutory terms are to be defined or construed according to common and approved usage of the language. Claude Fannin Wholesale Co. v. Thacker, Ky. App., 661 S.W.2d 477 (1983). We must avoid an interpretation that is at variance with the stated language of the statute. Layne v. Newberg, Ky., 841 S.W.2d 181 (1992). Further, we must accord to the statute its plain meaning. We cannot ignore that meaning simply because another interpretation, such as Ball suggests here, might be considered as stating a better policy. Board of Education of Nelson County v. Lawrence, Ky., 375 S.W.2d 830 (1963). So long as Ball continues in the employment for Leslie Resources or a subsequent employer where his weekly wage is equal to or greater than his average weekly wage was at the time of injury, his weekly benefit shall be reduced by one-half. This statutory section further makes it abundantly clear that only during any period of cessation of that employment, whether temporary or permanent, and for whatever

reason, with or without cause, Ball shall be paid a full weekly benefit for his 10% permanent partial disability at the rate prescribed in paragraph (1)(b) of KRS 342.730. In those instances, Ball would be entitled to receive the sum of \$33.53 per week instead of the \$16.77 per week which he was awarded.

Accordingly, the decision by Hon. Thomas A. Nanney, Administrative Law Judge, is hereby AFFIRMED and the appeal by Ronnie A. Ball is hereby DISMISSED.

The board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert J. Greene
Pikeville, KY

BRIEF FOR BIG ELK CREEK
COAL CO., INC.:

Melissa Moore Lewis
Hazard, KY