

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-003043-WC

BLUEGRASS CONTRACTING

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-97-79134

DOUGLAS HAMMOND; JOHN B. COLEMAN,  
Administrative Law Judge; and  
WORKERS' COMPENSATION BOARD

APPELLEES

AND

NO. 1998-CA-003199-WC

DOUGLAS HAMMOND

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-97-79134

BLUEGRASS CONTRACTING; JOHN  
B. COLEMAN, Administrative  
Law Judge; and WORKERS'  
COMPENSATION BOARD

CROSS-APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, EMBERTON AND MCANULTY, JUDGES.

EMBERTON, JUDGE: This appeal and cross-appeal stem from those aspects of a workers' compensation proceeding that concern the award of temporary total disability benefits, the calculation of

the claimant's average weekly wage and impairment rating, and the denial of benefits for certain medical treatments. We affirm.

On July 1, 1997, the claimant, Douglas Hammond, sustained a back injury in the course of his employment with Bluegrass Contracting when the brakes on the dump truck he was operating failed, causing the truck to overturn as he was descending a hill. After five days of hospitalization, Hammond was diagnosed as having a compression fracture of his lower back and undertook a course of treatment from several doctors, including physical therapy. He has worked only one day since the accident.

Bluegrass paid voluntary total temporary disability benefits to Hammond from July 2, 1997, through February 12, 1998, at the rate of \$156.09 per week and medical expenses amounting to \$13,078.60. Hammond testified before the ALJ that, although he has applied for work through his local union, no work has been made available to him. The ALJ, after hearing evidence on the contested issues, concluded that Hammond was entitled to additional temporary total disability benefits for the period between February 12, 1998, through April 30, 1998. He awarded Hammond benefits based upon a 5% functional impairment, utilizing the factors in Kentucky Revised Statutes (KRS) 342.730(1)(b) to arrive at an occupational disability of 3.75%. Because Hammond had been employed by Bluegrass for less than thirteen weeks immediately preceding his injury, the ALJ calculated his average weekly wage pursuant to KRS 342.140(1)(e), arriving at a figure of \$234.13. The ALJ also denied Hammond's claim for payment of

certain physical therapy treatments on the basis that they could not be considered reasonable or necessary and relieved Bluegrass of responsibility for a radiology bill not submitted within forty-five days of treatment. Both Hammond and Bluegrass appealed the ALJ's decision to the Workers' Compensation Board which affirmed the decision of the ALJ.

In this forum, Bluegrass argues that the Board misinterpreted the new statutory definition of "temporary total disability" and that the ALJ should have reduced Hammond's benefits pursuant to KRS 342.730(1)(c) on the basis that he is capable of returning to the type of work he was performing prior to the injury. Hammond argues in his cross-appeal that the ALJ erred in calculating his impairment rating and average weekly wage and in holding a portion of his physical therapy treatments and radiology bill non-compensable.

We first address Hammond's contention that his average weekly wage was not properly calculated. Hammond argues that the ALJ should have considered his testimony that he earned approximately \$30,000 in 1996, or the evidence he submitted showing that he earned a total of \$8,026.35 in the thirteen week period prior to April 5, 1997. We find no error.

Hammond began working for Bluegrass in May 1997, and earned wages for eight weeks prior to his injury. Thus, as explained by the Supreme Court in C & D Bulldozing Company v. Brock,<sup>1</sup> KRS 342.140(1)(e) must be utilized to determine what Hammond would have earned during the thirteen week period

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<sup>1</sup> Ky., 820 S.W.2d 482, 484 (1991).

immediately preceding his injury and had he "been employed by the employer the full weeks and had worked, when work was available to other employees, in a similar occupation." As noted by the Board, the ALJ strictly complied with the statutory prescription and with the interpretation of the statute set out in Brock. Therefore, like the Board, we cannot say the ALJ erred in rejecting Hammond's alternative method of calculating his average weekly wage.

Next, we turn to the arguments of both Hammond and Bluegrass concerning the methodology employed in calculating Hammond's impairment rating under KRS 342.730, and in applying the modifying factor required to establish his average weekly wage. In determining Hammond's impairment rating, the ALJ relied upon medical evidence from Dr. M. G. Schiller who testified that Hammond had sustained a 25% compression fracture in the injury of July 1, 1997. Hammond argues that other medical experts testified to 30% to 50% compression fractures, and thus, the ALJ should have used the impairment table for compressions demonstrating a 26% to 50% rating. We disagree.

The Board correctly observed that the ALJ retains sole discretion on disputed medical evidence of choosing which physician's testimony to accept.<sup>2</sup> Because the ALJ supported his decision by the substantial evidence supplied by Dr. Schiller, it cannot be said that the evidence compelled a different result.<sup>3</sup>

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<sup>2</sup> Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977).

<sup>3</sup> Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

Bluegrass argues that because there was evidence that Hammond was capable of returning to work his weekly award of \$5.85 should be reduced by half under KRS 342.730(1)(c). It is true that the ALJ believed that Hammond was physically capable of returning to work on the basis of his own testimony and that of Dr. Bilkey. In fact, Hammond testified that he attempted to return to work but, when his employer found out about his back injury, he was let go. He also stated that he had attempted to find work through his local union. The ALJ considered these factors and concluded that they did not serve to trigger the statutory reduction. The Board carefully analyzed Hammond's situation in light of the statutory directives and concluded that there was no basis under the plain language of KRS 342.730 for either reducing or enhancing Hammond's weekly benefit of \$5.85. We find no error in that determination.

Bluegrass also complains about the imposition of an additional period of temporary total disability benefits. It contends that the ALJ misinterpreted the definition of "temporary total disability" set out under the new workers' compensation law and misapplied it to this case. We disagree.

KRS 342.0011(11)(a) defines "temporary total disability" as:

. . .the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.

The ALJ made the following finding concerning the duration of Hammond's temporary total disability award:

The plaintiff has also requested additional temporary total disability benefits from February 12, 1998 to April 30, 1998, the date of Dr. Bilkey's opinion that the plaintiff had reached maximum medical improvement. According to KRS 342.0011(11)(a) "temporary disability" is defined as the condition of the employee who has not reached maximum medical improvement from an injury and has not reached the level of improvement that would permit a return to employment. Although the plaintiff was released to light duty employment at an earlier date, he testified that he was not able to do so. I am convinced from his testimony and Dr. Bilkey's opinion regarding maximum medical improvement that the plaintiff did not meet this two-part test until April 30, 1998.

Bluegrass argues that the statute does not require a two-part analysis and that the factors (maximum medical improvement and ability to return to work), although interrelated, are actually independent of one another. Thus, Bluegrass argues, if either condition occurs, a claimant is no longer entitled to benefits for temporary total disability. In rejecting this contention, the Board noted that despite the fact that temporary total disability is now statutorily defined, the question of its duration remains a factual determination to be made by the ALJ. Although there was evidence in this case that Dr. Cheng concluded that he could return to light duty work with restrictions, the ALJ also heard Hammond's testimony that he was unable to do so, as well as Dr. Bilkey's statement that maximum medical improvement did not occur until April 30, 1998. On conflicting evidence, the ALJ is the sole arbiter of the weight

and credibility to be given the evidence.<sup>4</sup> Because there was substantial evidence supporting the ALJ's decision as to the duration of temporary total disability, we have no authority to set that determination aside.

Finally, Hammond asserts that the ALJ erred in refusing to require payment for physical therapy treatments past the eighteenth visit and in denying payment for radiological services which were clearly related to his work injury but were not submitted to the employer within the forty-five-day time frame set out in KRS 342.020(1). Under KRS 342.020, an employer is responsible for payment of reasonably necessary medical expenses. In Square D. Company v. Tipton,<sup>5</sup> the Supreme Court interpreted this section as relieving an employer of the burden of paying for expenses related to treatments and procedures which "are shown to be unproductive or outside the type of treatment generally accepted by the medical profession as reasonable in the injured worker's particular case." Here, the ALJ relied upon the testimony of the physical therapist who stated that there was no need for continued treatment past the eighteenth visit since Hammond ceased to show improvement. This conclusion was bolstered by the opinions of two physicians. Thus, there was substantial evidence supporting the ALJ's conclusion that

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<sup>4</sup> Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985).

<sup>5</sup> Ky., 862 S.W.2d 308,310 (1992).

additional physical therapy past the eighteenth visit was neither reasonable nor necessary.<sup>6</sup>

As to the bills for radiological studies while Hammond was in the hospital for treatment of this injury, the ALJ disallowed the claim on the basis that the provider failed to submit its statement within forty-five days of the date treatment was rendered. KRS 342.020(1) provides in pertinent part:

The employer, insurer, or payment obligor acting on behalf of the employer, shall make all payments for services rendered to an employee directly to the provider of the services within thirty (30) days of receipt of a statement for services. The commissioner shall promulgate administrative regulations establishing conditions under which the thirty (30) day period for payment may be tolled. The provider of medical services shall submit the statement for services within forty-five (45) days of the day treatment is initiated and every forty-five (45) days thereafter, if appropriate, as long as medical services are rendered. . . . (Emphasis added).

In this case, although the services were performed on July 1, 1997, July 2, 1997, and July 5, 1997, the bill for these services was not received by Bluegrass's payment obligor until May 29, 1998. The actual health insurance claim forms for these services bore a date of May 27, 1998, and on each of the forms the medical provider had checked the box stating that the patient's condition was related to his employment. As the Board acknowledged, this is not a situation in which the medical provider had no way of knowing it was dealing with a work-related incident. We, therefore, agree with the Board that the plain

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<sup>6</sup> Special Fund v. Francis, supra.



language of KRS 342.020(1) must be construed as relieving Bluegrass from responsibility for claims which were not filed in accordance with the statute.

The opinion of the Workers' Compensation Board is in all respects affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-  
APPELLEE:

Douglas A. U'Sellis  
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BRIEF FOR APPELLEE/CROSS-  
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