

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000427-WC

PONTIKI COAL CORPORATION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-97-72452

GENE WHITT;  
HON. DONALD G. SMITH,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: HUDDLESTON, MILLER, AND TACKETT, JUDGES.

MILLER, JUDGE: Pontiki Coal Corporation asks us to review an opinion and award of the Workers' Compensation Board (board) rendered January 21, 2000. Kentucky Revised Statutes (KRS) 342.290. We affirm.

The board affirmed an opinion and award of the Administrative Law Judge (ALJ) rendered September 8, 1999, awarding appellee, Gene Whitt, benefits for permanent and total disability as a result of a work-related injury sustained on July 14, 1997.

On this appeal, Pontiki raises two questions for our consideration: (1) whether the board appropriately and correctly interpreted and applied the American Medical Association (AMA) Guidelines on the issue of the effects of the natural aging process; and (2) whether the decision is supported by substantial evidence.

The resolution of these questions requires interpretation of KRS 342.0011(1) enacted by the legislature effective December 12, 1996. That section provides as follows:

"Injury" means any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. "Injury" does not include the effects of the natural aging process, and does not include any communicable disease unless the risk of contracting the disease is increased by the nature of the employment. "Injury" when used generally, unless the context indicates otherwise, shall include an occupational disease and damage to a prosthetic appliance, but shall not include a psychological, psychiatric, or stress-related change in the human organism, unless it is a direct result of a physical injury.  
(Emphasis added.)

In view of the foregoing, we must look to the evidence to determine whether it supports the award of total and permanent disability in contemplation of the statute. In affirming the ALJ's award of total permanent disability, the board stated as follows:

In order to accurately define the meaning of permanent total disability under the Workers' Compensation Act, as it was modified on December 12, 1996, one must consider the definition of "work" as contained in KRS 342.0011(34) in addition to

the definition of permanent total disability in KRS 342.0011(1)(c). Placing these two definitions together, one is directed to consider the following:

The condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work (providing services to another in return for remuneration on a regular and sustained basis in a competitive economy) as a result of an injury. . . . KRS 342.0011(11)(c); and KRS 342.0011(34).

The Legislature, by defining "work," in part with the use of the phrase "competitive economy," establishes that in determining whether an individual is totally occupationally disabled, one must not only consider their performance of a job, but their ability to "compete" for a job.

The essence of appellant's argument is that the board should have excluded claimant's natural aging process in arriving at his disability. Pontiki contends the worker's disability is attributable to his fifty years of age, and if the age element is "carved out," an award of total disability is unsustainable. We agree with the board that the Diagnostic Related Estimate Model incorporated in the AMA Guidelines automatically excludes the natural aging process. This being so, and there being ample evidence in the record supporting disability based upon AMA evaluations, we are bound to affirm. The weight and sufficiency of the evidence is a matter for the fact finder. See Square D Company v. Tipton, Ky., 862 S.W.2d 308 (1993), and Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). We are not

at liberty to disturb the ALJ's determination. See Cal Glo Coal Company v. Mahan, Ky. App., 729 S.W.2d 455 (1987).

For the foregoing reasons, the opinion and award of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Terri Smith Walters  
Pikeville, Kentucky

BRIEF FOR APPELLEE, GENE  
WHITT:

Robert G. Miller, Jr.  
Paintsville, Kentucky