RENDERED: FEBRUARY 16, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001635-WC

ANDREW BECKER — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-95-23075

CLEMCO FABRICATORS; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING
** ** ** ** **

BEFORE: COMBS, EMBERTON AND TACKETT, JUDGES.

EMBERTON, JUDGE: This is a petition for review filed by Andrew Becker after the Workers' Compensation Board reversed and remanded the opinion and award of the Administrative Law Judge. The rather unique nature of this case requires that its procedural history be detailed.

Becker and a co-employee were working on a job for Clemco Fabricators in Seymour, Indiana, and were returning from lunch on June 6, 1995, when they were involved in an automobile accident. As a result of the accident, Becker sustained fractures at the L-2 and L-3 vertebral sites. In addition to a

workers' compensation claim, he filed a personal injury action and a declaration of rights against the driver of the automobile, his co-employee. Clemco and its insurance carriers were joined as parties to the declaration of rights action to determine whether Becker was within the course and scope of his employment at the time of the accident. Clemco defended the workers' compensation action on the basis that Becker was not acting within the scope of his employment at the time of the accident.

The trial court issued an order finding that Becker was within the course and scope of his employment and that workers' compensation was his exclusive remedy. At approximately the same time, the workers' compensation arbitrator found that Becker was not in the course and scope of his employment and dismissed the workers' compensation claim. Clemco appealed the civil action and Becker appealed the workers' compensation action, which was held in abeyance pending the civil appeal.

On September 18, 1998, this court affirmed the trial court. Clemco's motion for discretionary review filed in the Supreme Court was denied.

The workers' compensation claim was removed from abeyance and the parties proceeded with their proof. A hearing was held on November 9, 1999, and on December 21, 1999, more than four years after the accident, the Administrative Law Judge rendered an opinion and order finding that Becker had reached maximum medical improvement in September 1996, and was unable to obtain gainful employment until September 1999. During the pendency of the appeals, Becker, who at the time of the accident

was twenty-five-years old, had returned to school and obtained an Associates Degree in the computer field in September 1999. At that time, he secured employment at a wage equal to, or greater than, his pre-injury employment. Based on these facts and recognizing that except for the rehabilitative initiative taken by Becker his occupational disability would have been much greater, the ALJ found as follows:

> I will conclude that the plaintiff is entitled to a 50% permanent partial disability award from September 15, 1996, through September 1, 1999, the date upon which he apparently secured employment "at a wage equal to or greater than" his preinjury wage. During that period of time it appears that he chose to work only part-time, however, I see no reason why he could not have maintained full-time employment, however, it certainly would have been at or near minimum wage. This was, of course, roughly one-half of what he was able to earn for the defendant-employer, and, therefore, I believe that a 50% permanent partial disability award for that time fairly and accurately reflects his loss [sic] earning capacity.
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> Effective September 1, 1999, the provisions of KRS 342.730(1)(b) as effective on June 6, 1995, "kick in." At that time he is entitled to receive permanent partial disability benefits at or no more than two times his functional impairment rating. Having considered the plaintiff's age, education, occupation, past work experience, transferable skills, and his current physical condition and limitations, I believe he has established, at the present time, an occupational disability of 10%. Effective September 1, 1999, and continuing for a period not to exceed 425 weeks in the aggregate from September 26, 1996, he will receive benefits based upon a 10% partial disability. This is, of course, within the parameters of KRS 342.730(1)(b).

The Workers' Compensation Board found that there is substantial evidence to support either a 50% occupational disability or 10% disability; it did not, however, approve of the ALJ's "splitting" of a permanent partial disability. Although recognizing that the ALJ "crafted a creative and probably common sense right thing to do in connection with splitting permanent partial disability benefits," the Board explained as follows:

> Essentially, the ALJ awarded Becker a period of "temporary partial disability." The problem is our statute does not provide for an award of "TPD." Interestingly, when Kentucky created its first workers' compensation law, the 1916 General Assembly enacted, in Section 17 of the Act, a provision for "temporary partial disability." That statute provided:
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> > A weekly compensation equal to sixty-five percent (65%) of the difference between his average weekly earnings before the injury and the average weekly earnings which he earns or is able to earn in some suitable employment after the injury and during such disability, not to exceed three hundred thirty-five (335) weeks from the date of injury nor exceeding the sum of twelve dollars ($12.00) per week nor the maximum sum of four thousand dollars ($4,000.00). . . .
>
> This statutory provision was repealed decades ago. And, although from time to time a General Assembly has briefly considered its re-enactment, the Legislature has chosen not to do so. For a commentary of the provision of "temporary partial disability," see Workmen's Compensation Law of Kentucky, annotated and explained by Nicholas H. Dosker, (1916).

We agree with the Board that there is no specific statutory provision providing the remedy fashioned by the ALJ. However, it is clear that permanent disability benefits are subject to review under our reopening statute. As pointed out by

Becker, had this case proceeded in the usual course of time, he would have received his award until such time he was employed at an equal or greater wage and the employer moved for reopening.[1] To quote from the well-reasoned dissenting opinion of Board Member Lovan:

> While the Board has never been faced with an issue identical to the one now before us, we have been faced with the converse. Shortly after the 1994 change, we frequently addressed the issue of whether an individual having returned to work for a short period of time before ceasing employment was limited to one or two times functional impairment if he later left that employment. In those situations, we acknowledge that since KRS 342.125, the reopening statute, permitted reopening under those circumstances, it would be illogical to prohibit the ALJ from considering those issues during the original claim.

A basic tenet of workers' compensation is to protect the injured worker and the purpose of the law is to compensate injured workers.[2] If Becker is permitted an award of only 10% disability for the duration of his disability, the purpose of the law has not been obtained and the basic tenet of workers' compensation is rejected. We believe that the ALJ reached a correct solution to a unique case.

The opinion of the Workers' Compensation Board is reversed and the opinion and award of the ALJ is reinstated.

ALL CONCUR.

BRIEF FOR APPELLANT: BRIEF FOR APPELLEE CLEMCO

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[1] See Peabody Coal Company v. Gossett, Ky., 819 S.W.2d 33 (1991).

[2] Campbell v. Sextet Mining Company, Ky., 912 S.W.2d 25 (1995).

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