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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000838-WC

CLEAN ENERGY MINING COMPANY — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-97-66101

RONALD PRATER;
JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

AND: CROSS APPEAL NO. 2000-CA-000869-WC

RONALD PRATER — CROSS-APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-97-66101

CLEAN ENERGY MINING COMPANY;
JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, Chief Judge, BUCKINGHAM and McANULTY, Judges.

BUCKINGHAM, JUDGE: Appellant, Clean Energy Mining Company, and cross-appellant, Ronald Prater, petition for our review of an opinion of the Workers' Compensation Board (Board) rendered March 3, 2000, affirming an opinion and award rendered November 12, 1999, by an administrative law judge (ALJ) granting Prater temporary total disability (TTD) benefits as paid and permanent partial disability (PPD) benefits of $271.57 per week for 520 weeks beginning January 26, 1998. We affirm.

Prater was injured on October 6, 1997, while moving a miner cable as an employee of Clean Energy. Prater has not worked since that injury and underwent a cervical discectomy on February 24, 1998. Prater sought permanent disability benefits based on evidence of both physiological and psychological impairment.

As to Prater's injuries, the ALJ considered evidence from several doctors who treated Prater. The ALJ adopted the findings of Dr. James Templin with regard to a 19% physiological impairment rating and Dr. William Weitzel's 8% psychological impairment rating for a total impairment rating of 27%. Pursuant to Kentucky Revised Statues (KRS) 342.730(1)(b),[1] the ALJ multiplied Prater's impairment by a factor of 2 for a 54% impairment. Finally, pursuant to KRS 342.730(1)(c)1, the ALJ multiplied Prater's benefit by 1.5 since Prater could not perform the same type of work he could prior to the injury. Both Prater

[1] All references in this opinion to the statutes are to those in effect prior to the 2000 amendments.

and Clean Energy appealed to the Board which issued an opinion affirming the ALJ's decision. These petitions for review followed.

Appeal No. 2000-CA-000838-WC

Clean Energy contends on appeal that the Board erred in failing to carve out a portion of Prater's award to allow for the natural aging process as required by KRS 342.0011(1).[2] Dr. Templin's report stated that 50% of Prater's impairment was due to the arousal of a pre-existing dormant degenerative condition attributable to the natural process of aging. However, Dr. Templin's report also indicated that the dormant condition had no effect until aroused by the work-related injury.

The Board acknowledged that it had struggled with the natural aging carve-out issue in the past. The Board reasoned that the American Medical Association (AMA) guidelines used to determine impairment already allow for the natural effects of aging. The Kentucky Supreme Court recently addressed the natural aging carve out issue of KRS 342.0011(1) in McNutt Construction/First General Services v. Scott, Ky., 40 S.W.3d 854 (2001). We view the McNutt court's analysis of this question as directly on point and quote therefrom:

> As we construe the definition of "injury," the critical question is one of causation. Although KRS 342.0011(1) clearly indicates that the effects of the natural aging process are not considered to be an "injury," it also clearly indicates that work-related trauma "which is the proximate cause producing a harmful change in the human organism" *is* an

[2] KRS 342.0011(1) provides in pertinent part that "'Injury' does not include the effects of the natural aging process. . . ."

> "injury." When the two provisions are considered in concert, it appears that their purpose is to emphasize that only those harmful changes which are proximately caused by work-related trauma are compensable pursuant to Chapter 342. Where work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change; hence, the harmful change comes within the definition of an injury. [footnote omitted]

Id. at 859. A review of the medical evidence indicates there was no impairment prior to the work-related injury. Therefore, we believe the ALJ did not err in failing to reduce Prater's award for the natural effects of aging and the Board did not err in affirming the ALJ. We thus affirm the Board on this issue.

Cross-Appeal No. 2000-CA-000869-WC

Prater argues on cross-appeal that (1) the ALJ erred in the way he applied KRS 342.730(1)(d) to his benefit calculation and (2) that KRS 342.730(1)(b) violates sections 29 and 60 of the Kentucky Constitution.

With regard to Prater's first claim of error, we disagree that there was any error in calculating Prater's benefit. The Board affirmed the ALJ's calculation method as it followed the method spelled out by the Board in Kiah Creek Mining v. Stewart, Claim No. 97-76965, rendered September 3, 1999. Both this court and the Kentucky Supreme Court have since affirmed the Board's calculation method in Stewart v. Kiah Creek Mining, Ky., 42 S.W.3d 614 (2001). The court in Stewart held that to calculate PPD benefits the impairment percentage is multiplied by either 66 2/3% of the worker's average weekly wage or 75% of the state's average weekly wage, whichever is less. Id. at 618.

Prater argues that because he cannot return to the same type of work, 100% and not 75% of the state's average weekly wage is the figure to apply in KRS 342.730 (1)(b). However, the 100% figure is only relevant in determining the maximum amount of benefit allowed under KRS 342.730(1)(d).

Finally, Prater contends that the portion of KRS 342.730(1)(b) that requires calculating PPD awards based on the latest edition of the AMA's guide to evaluation of permanent impairment is an unconstitutional delegation of legislative authority. The Board did not review this issue as it is without jurisdiction to address constitutional issues. Put simply, we disagree with Prater's assertion. Prater relies on the Kentucky Supreme Court's holding in Legislative Research Com'n v. Brown, Ky., 664 S.W.2d 907 (1984), prohibiting the General Assembly from delegating broad legislative powers. Prater's reliance on Legislative Research is misplaced. Legislative Research dealt with the separation of powers issue in terms of encroachment on one of the other three branches of government as opposed to this type of situation.

While it is clearly established that the legislature cannot delegate is legislative power, this is not a rule without exceptions. Bloemer v. Turner, 281 Ky. 832, 137 S.W.2d 387 (1940). As stated in Bloemer and reaffirmed in Holsclaw v. Stephens, Ky., 507 S.W.2d 462 (1973), the legislature can "make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." Holsclaw, 507 S.W.2d at 471. We believe there is

clearly no constitutional violation in the legislature adopting the expertise of the American Medical Association as part of the law in KRS 342.730(1)(b).

For the foregoing reasons, the opinion of the Board is affirmed. Additionally, we hold that KRS 342.730(1)(b) does not violate the Kentucky Constitution.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEES CLEAN ENERGY COAL COMPANY:	BRIEF FOR APPELLEE/CROSS-APPELLANTS RONALD PRATER:
A. Stuart Bennett Lexington, Kentucky	Kelsey E. Friend Pikeville, Kentucky