RENDERED: MAY 10, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001957-WC

ALICE FAY JACKSON — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-97-90519

J.C. PENNY COMPANY
AND WORKERS' COMPENSATION BOARD — APPELLEES

AND NO. 2001-CA-002184-WC

J.C. PENNY COMPANY — CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-97-90519

ALICE FAY JACKSON;
LANDON OVERFIELD,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

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

BEFORE: BARBER, EMBERTON, AND KNOPF, JUDGES.

BARBER, JUDGE: The Appellant, Alice Fay Jackson ("Jackson"), seeks review of an opinion of the Workers' Compensation Board, reversing the ALJ's determination of the dollar amount of her

award and remanding. Jackson's employer, J.C. Penney Company, cross-petitions, on the ground that the psychiatric element of Jackson's award lacks a substantial evidentiary foundation. Finding no error, we affirm.

On January 4, 2000, Jackson filed her application for resolution of injury claim, alleging a March 22, 1997 left knee injury and depression due to that injury. The ALJ determined that Jackson had an 8% functional impairment due to her knee injury and a 25% functional impairment due to her psychological condition caused by the left knee injury, for a combined functional rating of 31% based upon the AMA Guidelines. The ALJ calculated the award as follows:

> 6. Plaintiff has a 69.75% permanent partial disability. This is calculated by multiplying Plaintiff's 31 functional impairment rating times the 2.25 factor as required by K.R.S. 342.730(1)(b).
>
> 7. I find that, . . . Plaintiff does not retain the physical capacity to return to the type of work she was performing at the time of her injury. Therefore, her benefit for permanent partial disability shall be 1 2 times the amount otherwise determined under subparagraph (b) of KRS 342.730(1). Based on Plaintiff's average weekly wage, $192.13, . . . Plaintiff's permanent partial disability benefits will be paid at the rate of $134.01 per week. The calculations are as follows:
>
> (a) $192.13 x 66-2/3% = $128.09.
> (b) $128.69.75% = $89.34 x 1.5 = $134.01

Thus, the ALJ awarded ppd benefits in a weekly amount greater that what Jackson would have received had she been totaled. Not surprisingly, the employer appealed, and also challenged the foundation of the psychiatric award, contending

that Dr. Granacher's opinion was based upon an inaccurate history.

The Board reversed in part and affirmed in part:

> It is JC Penny's [sic] belief that Dr. Granacher was operating under a mistaken or false history and, therefore, his statement that the problems were related to the 1997 JC Penny [sic] injury does not constitute substantial evidence of probative value. It relies in part upon Osborne vs. Pepsi-Cola, Ky., 816 S.W.2d 643 (1991) . . . . As we have stated on numerous occasions, this case authorizes but does not mandate that the fact finder disregard this testimony. The evidence from Dr. Granacher is by way of report. His report outlines, . . . a multitude of medial evidence that was considered by him. While there are certainly statements within his report which could have led the ALJ to conclude Dr. Granacher lacked a complete and accurate medical history, we also believe it was a reasonable inference to be drawn from the record that in Dr. Granacher's review of all of this information he was presented with as clear of an object picture as was available without relying upon historical information provided by the worker.
>
> Reasonable inferences, of course, are for the ALJ. [Citation omitted.] Upon considering the totality of this information, it returns us to a question of weight and credibility. There was conflicting testimony from Dr. Granacher and Dr. Shraberg concerning causation and the sole authority for assessing weight and credibility rests with the factfinder . . . . Dr. Grancher's evidence is of such a qualitative nature as to constitute substantial evidence.
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> . . . .
>
> JC Penny [sic] believes the ALJ erroneously interpreted KRS 342.730(1)(d) and Jackson's benefits should have been limited to 99% of 66 2/3% of her average weekly wage. The ALJ, however, in response to the petition for reconsideration concluded otherwise and in doing so relied upon the Board's and Court of Appeals opinion in Kiah Creek Mining vs.

Stewart, Claim No. 97-76963, rendered September 3, 1999. That case has how [sic] been resolved by the Supreme Court which affirmed this Board's interpretation of that statutory provision. See Stewart vs. Kiah Creek Mining, Ky., 42 S.W.3d 614 (2001).

. . . .

As we view KRS 342.730(1)(d) as a general concept it is what might be considered a statutory provision of limits. It identifies limits to be applied to [the duration of] permanent partial disability awards . . . .

After the assessment of these initial limits, three distinct limitations are placed upon the dollar amount available to an individual receiving a permanent partial disability award. They are 99% of 66 2/3% of the individual's average weekly wage; 75% of the state average weekly wage; or 100% of the state average weekly wage if the 1.5 enhancer based upon the lack of the physical ability to return to work is implemented. Therefore, in every circumstance, each of these limits must be viewed differently.

The first limitation is 99% of 66 2/3% of the average weekly wage. This dollar limitation is applicable to every injured employee receiving a permanent partial disability award. The remaining two limits apply only if weekly benefits, after the permanent disability rating is determined and after the 1.5 enhancer is used, are greater than 75% or 100% of the state average weekly wage. We believe the entire purpose of the 99% limit is to satisfy a general purpose that an individual receiving a permanent partial disability award may not receive a weekly dollar amount greater than what the individual would receive if they were awarded permanent total disability benefit . . . . **As was seen in Stewart vs. Kiah Creek Mining, if the individual has an average weekly wage sufficient for maximum benefits then the remaining limits based upon the state average weekly wage would be appropriate.**

The instant action presents us with a different picture and one in which the initial dollar limiting percentage is

> appropriate. If Jackson had been awarded total disability benefits, she would have received $128.09 per week . . . . If the interpretation of [KRS 342.730(1)(d)] . . . is as set forth by the ALJ . . . she will receive approximately $6.00 more per week, . . . than she would have received on a weekly basis for total disability. This, in our opinion, is an unreasonable result . . . [Jackson] is therefore limited to the sum of $126.81 per week for a period of 520 weeks, which represents 99% of 66 2/3% of her average weekly wage for a permanent partial disability. Accordingly, the ALJ shall enter an award of $126.81 per week for a period of 520 weeks. (Emphasis added.)

On appeal, Jackson argues that the Board erred in reversing the ALJ's calculation of benefits, specifically that the Board "refused to adhere to the Supreme Court's holding" in Kiah Creek, supra. Penney cross-petitions and contends that Dr. Granacher's opinion on causation cannot support an award, because he did not have a correct history.

We address the cross-petition first. The Board explained that Dr. Granacher had reviewed a multitude of medical evidence; thus, it could be inferred that he had other information upon which to rely besides the historical information related by Jackson. We also note that the employer did not object to the filing of Dr. Granacher's report, nor did the employer challenge Dr. Granacher's causation opinion by way of cross-examination. We agree with the Board that Dr. Granacher's opinion constitutes substantial evidence, and we affirm in that regard.

Kiah Creek deals with "the method for calculating the weekly benefit of a partially disabled worker who does not retain

the physical capacity to return to the type of work that he performed at the time of the injury. KRS 342.730(1)(b)(c) and (d)." Id. at 615. The version of the statute applicable there[1], and in the case *sub judice*, provides, in pertinent part:

> (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 . . . .
>
> . . . .
>
> (c) 1. If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be one and one-half (1- 1/2) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments.
>
> . . . .
>
> (d) For permanent partial disability, if an employee has a permanent disability rating of fifty percent (50%) or less as a result of a work-related injury, the compensable permanent partial disability period shall be four hundred twenty-five (425) weeks, and if the permanent disability rating is greater than fifty percent (50%), the compensable permanent partial disability period shall be five hundred twenty (520) weeks from the date the impairment or disability exceeding fifty percent (50%) arises. **Benefits payable for permanent partial disability shall not exceed ninety-nine percent (99%) of sixty- six and**

[1] the December 12, 1996 version

> **two-thirds percent (66- 2/3%) of the employee's average weekly wage as determined under KRS 342.740 and shall not exceed seventy-five percent (75%) of the state average weekly wage, except for benefits payable pursuant to paragraph (c)1. of this subsection, which shall not exceed one hundred percent (100%) of the state average weekly wage,** nor shall benefits for permanent partial disability be payable for a period exceeding five hundred twenty (520) weeks, notwithstanding that multiplication of impairment times the factor set forth in paragraph (b) of this subsection would yield a greater percentage of disability. (Emphasis added.)

The Supreme Court explained that when the 1.5 multiplier is applied to benefits where the disability rating is greater than 66.67%, that results in a ppd benefit that exceeds the maximum benefit for total disability, which becomes significant under KRS 342.730(1)(d). The Court found nothing unclear in KRS 342.730(1)(d) — the statute limits the maximum benefit for partial disability to 99% of 66 2/3% of the ***worker's average weekly wage,*** unless KRS 342.730(1)(c) applies, in which case the benefit is limited to 100% of the ***state's average weekly wage.***

The Court set forth the proper method for calculating the award of a partially disabled worker who is unable to return to the type of work he performed at the time of the injury:

> 1. Calculate the benefit for partial disability as directed by KRS 342.730(1)(b):
>
> a.) Calculate the permanent disability rating by multiplying the AMA impairment by the

applicable factor from the table in KRS 342.730(1)(b)
b.) Multiply the disability rating by 66 2/3% of the worker's average weekly wage or 75% of the state's average weekly wage, whichever is less.

2. Multiply the benefit for partial disability by 1.5 as directed by KRS 342.730(1)(c)

3. Apply KRS 342.730(1)(d):

a.) Determine the duration of the benefit based upon the permanent disability rating obtained in step 1a.

b.) Limit the benefit to a maximum of 99% of 66 2/3% of the worker's average weekly wage ***and*** 100% of the state's average weekly wage because KRS 342.730(1)(c)1 applies.

c.) The duration of the benefit may not exceed 520 weeks even if the permanent disability rating equals or exceeds 100%.

Id. at 618. (Emphasis added.)

Applying this method of calculation to the facts before us gives us the same result as reached by the Board':

(1)(a) The permanent disability rating is 69.75%

(31% AMA functional x 2.25 factor from the table in KRS 342.730(1)(b))

(b) Jackson's average weekly wage is $192.13
66 2/3% x $192.13 = $128.09

$128.09 x disability rating of 69.75% = $89.34.

2. Multiply $89.34 x 1.5 = $134.01

(a) The duration of the benefit is 520 weeks.

(b) Limit the benefit to a maximum of 99% of 66 2/3% of the workers' average weekly wage ***and*** 100% of the state's average weekly wage, because KRS 342.730(1)(c)(1) applies.

99% x $128.09 = $126.81.

As the Board explained, Jackson's average weekly wage is less than 100% of the state average weekly wage, so that limitation does not apply. We conclude that the Board correctly applied the holding in Kiah Creek, supra, and find no error.

We affirm the Board's August 15, 2001 opinion affirming in part, and reversing in part, and remanding.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
John E. Anderson Cole, Cole & Anderson PSC Barbourville, Kentucky	W. Barry Lewis Lewis and Lewis Law Offices Hazard, Kentucky