

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001332-WC

GEORGE HUMFLEET MOBILE HOMES

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-00-96269

DENNIS CHRISTMAN; DONNA H. TERRY,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM and HUDDLESTON, Judges.

HUDDLESTON, Judge: George Humfleet Mobile Homes appeals from a Workers' Compensation Board decision which reversed an ALJ's award finding Dennis Christman not to be totally disabled. Because Christman has not filed a brief, we adopt Humfleet's statement of the facts and issues presented as correct:¹

After reviewing the evidence, the ALJ concluded that [Christman] was not totally disabled, relying on the

¹ See Ky. R. Civ. P. (CR) 76.12(8)(c)(i).

opinions of Drs. [Russel] Travis and [Gregory] Snider. Regarding the extent and duration of [Christman's] partial disability, the ALJ stated:

Utilizing the authority of an Administrative Law Judge to select among competing expert testimony,^[2] the Administrative Law Judge adopts the expert opinion of Drs. Travis that Mr. Christman has sustained a 15% whole man impairment as the result of his cervical complaints and the expert opinion of Dr. Templin of a 5% impairment for the lumbar condition. . . . The Administrative Law Judge finds that none of the impairment ratings was active prior to January 26, 2000.

[] The ALJ therefore awarded benefits based on a 20% impairment.

[Christman] subsequently filed a Petition for Reconsideration in which he argued that it was error for the ALJ to rely on the impairment rating of Dr. Travis which was calculated under the 4th edition [of the American Medical Association Guides to the Evaluation of Permanent Impairment]. Christman argued that the ALJ should have used the second (and higher) of the 5th edition ratings provided by Dr. Templin. [Christman] alleged that the lowest impairment rating for a cervical

² Seventh Street Road Tobacco Warehouse v. Stillwell, Ky., 550 S.W.2d 469 (1976).

condition that could be assessed under the 5th edition Guides was 25%, hence the award should be based on a 30% impairment.

The ALJ overruled [Christman's] petition, noting that [Christman] had not at any time objected to the submission of Dr. Travis's impairment rating. The ALJ stated that she was without authority to translate Dr. Travis's findings with regard to [Christman's] cervical condition into an impairment rating.

[Christman] then appealed to the Workers' Compensation Board. In an Opinion rendered May 22, 2002, the Board held that the ALJ erred as a matter of law in relying on the impairment rating of Dr. Travis. The Board held that in claims filed after the Commissioner of the Department of Workers' Claims certified the 5th edition of the Guides as being "available," only impairment ratings determined under the 5th edition may be used, regardless of when the impairment rating was made.

Humfleet's main argument on appeal to this Court is that in this instance, it was proper for the ALJ to rely on the impairment rating assessed by Dr. Travis under the 4th edition of the AMA Guides. In the alternative, Humfleet argues that the ALJ's decision was supported by substantial evidence, and therefore may not be disturbed on appeal, even if Dr. Travis' opinion is disregarded.

As a threshold matter, we must decide if it is proper to review the allegation that the ALJ erred as a matter of law by relying on Dr. Travis' opinion, given that no objection was made by Christman until after the ALJ's award was issued. Ordinarily, an issue is not properly presented on appeal which has not been initially presented to the trier of fact.³ However,

[w]orkers' compensation is a creature of statute. As set forth in [Kentucky Revised Statutes (KRS)] Chapter 342, workers' compensation proceedings are administrative rather than judicial. Although the principles of error preservation, res judicata, and the law of the case apply to workers' compensation proceedings, they apply differently than in the context of a judicial action. For that reason, authority based upon judicial proceedings is not necessarily binding in the context of proceedings under Chapter 342.⁴

* * *

The legislature has indicated that the standard to be employed by the Board (and previously by the circuit court) when reviewing workers' compensation awards includes a consideration of whether the award in question conforms to the provision of the Act.⁵ Since January 4, 1988, KRS 342.290 [] has provided that the scope of review by the Court of Appeals includes a

³ See CR 76.12(4)(c)(v).

⁴ Whittaker v. Reeder, Ky., 30 S.W.3d 138, 143 (2000).

⁵ Ky. Rev. Stat. (KRS) 342.285(2)(c).

consideration of all matters subject to review by the Board and errors of law arising before the Board In Muncy v. Muncy, [⁶ Kentucky's highest court] determined that whether an award conformed to the Act was a question of law which a court should review without regard to whether it was contested by a party. Subsequently, in Schaab v. Irwin, [⁷ the Court] construed KRS 342.285(2) (c) and KRS 342.290 as placing a duty on a reviewing court to determine whether an award was in conformity with the Act even if the question first arose there.⁸

In the case before us, the primary question is whether or not the ALJ's award conformed to the requirement in KRS 342.730(1) (b) that the award be determined using the "latest edition available" of the AMA Guides. Therefore, it was proper for the Board to rule on the issue, as it is likewise proper for us to decide.

KRS 342.730(1) (b) requires that an ALJ's award be determined with respect to the "latest edition available" of the Guides. That language refers to the edition of the Guides certified by the Commissioner of the Department of Workers' Claims as being generally available at the time of the ALJ's award. In this case, the fifth edition had been certified by the commissioner as generally available prior to the ALJ's award.

⁶ 242 Ky. 190, 45 S.W.2d 1034 (1932), overruled on other grounds by Carnahan v. Yocom, Ky., 526 S.W.2d 301, 303 (1975).

⁷ 298 Ky. 626, 183 S.W.2d 814 (1944).

⁸ Reeder, supra, n. 4, at 144.

Accordingly, when the ALJ determined Christman's partial disability, she did so using an impairment rating determined under the fourth edition of the Guides. While this action is not wholly unreasonable under the unique chronology of this case, it was improper under the plain language of KRS 342.730(1)(b), which mandates that an award be determined using the latest edition of the Guides available at the time of the award. We affirm the Board, and remand to the ALJ for re-evaluation using only impairment ratings determined under the fifth edition of the AMA Guides.

Humfleet's argument that the ALJ's decision is not supported by substantial evidence lacks sufficient merit to warrant an elaborate discussion. Essentially, Humfleet argues that there was other evidence in the record to support a 15% impairment rating under the fifth edition of the Guides. While that testimony may indeed be in the record, the ALJ did not make a finding as to its credibility or reliability. The Board's decision is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

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