

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2003-CA-000149-WC

BOB LAYER GENERAL EXCAVATING

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-61897

ROGER A. CHILTON;
ROGER D. RIGGS,
ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER, COMBS, AND SCHRODER, JUDGES.

BAKER, JUDGE. Bob Layer General Excavating ("Bob Layer") petitions us to review an Opinion and Order of the Workers' Compensation Board ("the Board") entered December 18, 2002. We affirm.

On September 12, 1998, Roger A. Chilton ("Chilton") suffered a work-related injury while in the employ of Bob Layer. Chilton subsequently filed a workers' compensation claim. The Administrative Law Judge (ALJ) ultimately awarded

Chilton permanent partial disability (PPD) benefits based upon a seventeen percent impairment rating to the body as a whole. Additionally, the ALJ awarded Chilton temporary total disability (TTD) benefits from September 17, 1998, through September 20, 1998, and from October 1, 1998, through October 2, 2000. Bob Layer timely filed a Petition for Reconsideration which was denied by the ALJ on August 5, 2002. Bob Layer then filed an appeal with the Workers' Compensation Board on August 21, 2002. On December 18, 2002, the Board rendered an Opinion and Order dismissing. The Board determined that Bob Layer's appeal with regard to the issue of TTD benefits was untimely filed. This review follows.

Bob Layer contends that the Board committed error by concluding that its appeal was untimely filed. Specifically, Bob Layer contends that the Board overlooked the fact that it timely filed a Petition for Reconsideration on August 5, 2002, thus extending the deadline for an appeal to the Board to September 4, 2002. Chilton agrees with Bob Layer that the Board erred in determining that the appeal was untimely filed. Specifically, Chilton states in his brief that "the Board overlooked the Appellant's Petition for Reconsideration when it calculated the date by which an appeal should have been filed. In considering the Petition for Reconsideration and the ALJ's order overruling said Petition, the appeal to the Board was

timely filed." Brief for Appellee at 3. We believe it evident that Bob Layer timely filed an appeal to the Board; thus, we proceed to the merits of this case. See Keefe v. O.K. Precision Tool & Die Co., Ky. App., 566 S.W.2d 804 (1978).

Substantively, Bob Layer contends that the ALJ's award of TTD benefits between March, 1999, and January, 2000, was not supported by substantial evidence. Although the Board dismissed the appeal as untimely, the Board, nevertheless, concluded that the ALJ's award of TTD benefits was indeed "supported by substantial evidence." In the case at hand, it appears that Chilton was originally scheduled for surgery in March, 1999, but failed to have the surgery until January, 2000. It is this ten-month period between the time Chilton was first scheduled for surgery and the date of his actual surgery that Bob Layer contests. Specifically, Bob Layer argues:

Layer points out that it is undisputed that Chilton was advised by Dr. Raque *no later* than December 28, 1998 that he needed to undergo cervical surgery. It is also undisputed that Chilton's surgery was originally scheduled in mid-March 1999. Thus, Chilton had more than two months in which to get himself mentally prepared to have this surgery. In spite of these facts, the ALJ determined that Chilton's delay in the performance of surgery was "reasonable and justified". Layer submits that two and one-half months is more than ample time for Chilton to have prepared himself mentally, and that any finding to the contrary constitutes an abuse of discretion.

Brief for Appellant at 4 (citations omitted).

Essentially, Bob Layer asserts that the ten-month delay was unreasonable; hence, it should not have been required to pay Chilton TTD benefits during such period. Apparently, Chilton testified that he was hesitant to undergo the surgery, and when he attempted to reschedule the surgery, it was discovered that he suffered from a heart problem. In any event, the ALJ concluded that:

Based upon the evidence it is the conclusion of the Administrative Law Judge, that inasmuch as Mr. Chilton was extremely emotionally distressed over undergoing surgery and also had some physical problems which may have prevented the performance of the surgery at an earlier date, any delay in the performance of surgery was reasonable and justified and that he is entitled to recover for temporary total disability benefits until he was released by Dr. Raque on October 2, 2000.

ALJ's Opinion and Order at 5 (emphasis added). We think the ALJ's finding that Chilton was extremely emotionally distressed about undergoing surgery was supported by Chilton's testimony and that this finding constitutes substantial basis upon which to base the ALJ's award of TTD benefits during the ten-month period. As such, we reject Bob Layer's claim that the ALJ's award of TTD benefits between the time period of March, 1999, and January, 2000, was not based upon substantial evidence.

For the foregoing reasons, the Opinion and Order of
the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, ROGER A.
CHILTON:

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