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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-001283-WC

AK STEEL CORPORATION — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-02-00301

ROGER C. JONES;
JAMES L. KERR, ADMINISTRATIVE LAW JUDGE; AND THE WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
** ** ** ** **

BEFORE: BAKER, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: AK Steel Corporation seeks review of an order of the Workers' Compensation Board, entered May 21, 2003, affirming an award of income benefits to Roger C. Jones. For more than thirty-five years, Jones performed maintenance duties for AK Steel and in the course of that employment was regularly exposed

to high levels of noise. An Administrative Law Judge (ALJ) found that as a result of this exposure Jones had suffered a hearing loss that amounted to an eight-percent whole-body impairment. Under KRS 342.7305, Jones was thus entitled to income benefits for permanent partial disability as provided for in KRS 342.730(1)(b). The ALJ further found that Jones was entitled to an enhanced benefit under KRS 342.730(1)(c)2. The Board affirmed both findings. On appeal, AK Steel contends that the ALJ's impairment finding is not supported by the medical evidence and departs without adequate explanation from an opinion of the university evaluator. It also contends that the ALJ and Board have misapplied the benefit-enhancement provision of KRS 342.730(1)(c)(2). With this second contention we agree.

AK Steel's first contention, however, misconceives our standard of review. As our Supreme Court has noted many times,

> [t]he function of further review of the WCB in the Court of Appeals is to correct the Board only where the . . . Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.[1]

There is no dispute that Jones suffers from a noise-related hearing loss as a result of his long career with AK Steel. The dispute is over the extent of the loss. Jones's

[1] Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

expert estimated a whole-body impairment of eight percent; AK Steel's expert estimated a six-percent impairment. The university evaluator found an impairment of twenty-one percent, but explained that that impairment included losses attributable to a middle-ear condition that had apparently arisen after Jones's employment. He estimated the work-related impairment to be in the neighborhood of ten percent. The ALJ declined to adopt the evaluator's finding because of the middle-ear complication, and found instead that Jones's impairment was eight percent. This finding was clearly supported by competent evidence and cannot seriously be characterized as unjust.

At his deposition, the university evaluator remarked that he believed that the office of AK Steel's expert, a physician, was better equipped to test hearing than the office of Jones's expert. He then admitted, however, that he had visited neither office. AK Steel asserts that this remark by the evaluator amounts to an opinion entitled to deference under KRS 342.315 endorsing its expert's finding of a six-percent impairment. We disagree. The remark was outside what is contemplated by the statute, which requires deference only to the evaluator's "clinical findings and opinions,"[2] and plainly was entitled to no special weight. The ALJ did not err by declining to address it.

[2] KRS 342.315(2).

We agree with AK Steel, however, that the ALJ and the Board have misconstrued the enhancement provisions of KRS 342.730(1). Subpart (b) of that statute explains how to calculate the basic income benefit in cases such as this one of permanent partial disability. Subpart (c) then provides for enhancement of that basic benefit in certain circumstances. Subpart (c)1 provides for a triple benefit when the employee's work-related injury prevents his return to his former work. Subpart (c)2 provides in part that

> If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection.[3]

In other words, if a partially disabled employee returns to work at his former wage or better, he is entitled to the basic benefit during his return to work and is entitled to twice the basic benefit during periods that his return to work

[3] *See* Fawbush v. Gwinn, Ky., 103 S.W.3d 5 (2003) (discussing recent amendments to these provisions).

ceases. If the employee does not return to work, however, then this subsection is not invoked.

Apparently Jones had non-work-related knee surgery in June 2001, and the following February, while he was still on leave from his job recuperating from the surgery, he had the hearing tests that confirmed and measured his work-related hearing loss. He filed the present claim for workers' compensation benefits on February 27, 2002. As of February 2003, when the ALJ ruled on Jones's claim, Jones had still not returned to work. Addressing whether Jones had the physical capacity to return to his former type of work, the ALJ found

> that plaintiff [Jones] can return to the type of work performed at the time of the injury at least as a result of his hearing. The plaintiff testified that he only ceased employment due to knee replacement surgery and problems associated with a diabetic condition.

Because Jones's work-related injury had not prevented his return to his former job, the ALJ correctly determined that he was not entitled to an enhanced benefit under KRS 342.730(1) subpart (c)1. Believing, however, that Jones's employment had "ceased" for the purposes of subpart (c)2, the ALJ ordered that his benefit be doubled in accordance with that subpart. This latter ruling was incorrect.

As noted above, subpart (c)2 does not apply unless the employee returns to work at or above his pre-injury wage. Able

employees are thus encouraged to resume working. If they do so, they are assured of an enhanced benefit in the event that the return to work is unsuccessful. If they decline to do so they forfeit that enhanced benefit. For the purposes of the statute, Jones is an able employee who has not resumed working. He is thus not entitled to an enhanced benefit. The ALJ and the Board erred by ruling otherwise.

Accordingly, we affirm the May 21, 2003, order of the Workers' Compensation Board insofar as it upheld the ALJ's impairment finding, but reverse and remand so that Jones's award may be recalculated in accordance with KRS 342.730(1)(b).

ALL CONCUR.

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