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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2003-CA-001100-WC

AK STEEL CORPORATION — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-02-00220

RAY ALLEN; HON. JAMES L. KERR, ADMINISTRATIVE LAW JUDGE; AND DEPARTMENT WORKERS' CLAIMS, — APPELLEES

OPINION

AFFIRMING IN PART AND

REVERSING IN PART

** ** ** ** ** ** ** **

BEFORE: McANULTY, MINTON, AND SCHRODER, JUDGES.

McANULTY JUDGE: AK Steel Corporation (AK Steel) seeks review of an opinion of the Workers' Compensation Board (Board) upholding the determination of the Administrative Law Judge (ALJ) that appellee Ray Allen is entitled to permanent partial disability benefits. AK Steel contends that the ALJ erred by failing to exclude that portion of Allen's hearing loss attributable to the natural aging process and by applying the times-two multiplier

provided for in KRS[1] 342.730(1)(c)2. For the reasons stated below, we affirm the ALJ's exclusion of the natural aging process in assessing Allen's hearing loss impairment, but reverse the ALJ's application of the times-two multiplier contained in KRS 342.730(1)(c)2 in calculating Allen's disability benefits.

In 1965 Allen was employed by AK Steel. His workstation was a steel mill, and over the next 37 years or so, Allen was exposed to loud industrial noise at work on a regular and daily basis. According to Allen, beginning in early 2000 he began to notice difficulty hearing when talking to people. Allen testified that he could hear noise but could not distinguish words, and that his hearing problem progressed and worsened over time. Allen last worked for AK Steel on January 31, 2002, at which time he voluntarily left its employ, due in part to his hearing problems, but also due to shoulder problems, diabetes, and prostate cancer.

AK Steel conducted annual hearing tests at the mill, and Allen acknowledged being informed by AK Steel that he was developing hearing loss; however, Allen testified that he was first informed that his hearing loss was work-related on February 14, 2002, by Dr. Charles Hieronymus following a medical examination. As a result, on February 19, 2002, Allen filed an

[1] Kentucky Revised Statutes.

Application for Resolution of Hearing Loss Claim with the Department of Workers' Claims pursuant to KRS 342.7305.

After filing his application, Allen was ordered to undergo an independent hearing loss evaluation by university evaluator Dr. Ian Windmill pursuant to KRS 342.315. Dr. Windmill determined that Allen displayed a hearing loss greater than would be expected for someone 60 years of age and, consequently, diagnosed Allen as suffering from hearing loss due to work-related noise exposure. On the other hand, Dr. Windmill also determined that approximately 25 to 30 percent of Allen's hearing loss could be explained based upon the natural aging process for a 60-year-old man. Based upon his evaluation, Dr. Windmill diagnosed Allen as suffering from an 8% functional impairment to his body as a whole.

Following a hearing, on December 11, 2002, the ALJ entered an opinion and award in which he expressly determined that Allen had an 8% occupational hearing loss as testified to by Dr. Windmill, and adopted this 8% impairment rating to be utilized in calculating an award of benefits. In calculating Allen's benefits, among other things, the ALJ applied the times-two multiplier contained in KRS 342.730(1)(c)2. In total, Allen was awarded $56.17 per week for permanent total disability benefits for 425 weeks.

AK Steel subsequently appealed the ALJ's award of benefits to the Board. On April 30, 2003, the Board entered an opinion affirming the ALJ's determinations. This petition for review followed.

First, AK Steel contends that the ALJ erred by failing to carve out the portion of Allen's hearing impairment attributable to the effects of the natural aging process as required by KRS 342.0011(1) and KRS 342.730(1)(e).

The ALJ made a specific finding that Allen suffered an 8% occupational hearing loss as testified to by the university evaluator, Dr. Windmill. The ALJ summarized Dr. Windmill's evaluation, in relevant part, as follows:

> Dr. Ian Windmill testified that plaintiff has a permanent functional impairment of 8% which is consistent with work-related noise exposure. He causally connected approximately 25 – 30% of plaintiff's hearing loss based to the natural aging process. . . . Dr. Windmill was deposed and asked about the assessment that about 25% of plaintiff's hearing loss is attributable to natural aging. Dr. Windmill was not able to state within a reasonable medical probability that some portion of plaintiff's 8% impairment is not due to noise exposure.

While the ALJ found that Allen had an 8% permanent functional hearing impairment, he also found that 25 – 30 percent of his hearing loss was related to the natural aging process. KRS 342.7305(2) provides as follows:

> Income benefits payable for occupational hearing loss shall be as provided in KRS 342.730, except income benefits shall not be payable where the binaural hearing impairment converted to impairment of the whole person results in impairment of less than eight percent (8%). No impairment percentage for tinnitus shall be considered in determining impairment to the whole person. (Emphasis added).

AK Steel argues that "in order to recover income benefits under KRS 342.7305, Allen is required to establish that he has at least an eight percent (8%) impairment after all non work-related factors, including age, are excluded." AK Steel contends that since Allen's total assessment is 8%, under Dr. Windmill's assessment, which attributes some of Allen's hearing loss to the natural aging process, Allen does not meet the 8% requirement imposed by KRS 342.7305.

Relying upon the rationale contained in an unpublished opinion of this Court in AK Steel Corporation v. Daniels, 2000-CA-002876-WC, rendered March 8, 2002, which addressed this issue, and quoting extensively therefrom, the Board affirmed the ALJ's decision not to exclude any portion of the hearing loss due to natural aging so as to reduce Allen below the 8% requirement imposed by KRS 342.7305. AK Steel asks us to "reconsider" the Daniels decision on the basis that Daniels failed to take into consideration KRS 342.730(1)(e).

We begin by noting that pursuant to the Kentucky Rules of Civil Procedure (CR) 76.28(4)(c), unpublished cases are not to be cited as precedent in Kentucky. Further, unpublished opinions are not binding on this panel as precedential authority. Id. Nevertheless, Daniels is precisely on point[2] and though not bound by its holding, we, like the Board, are persuaded by the rationale of Daniels, and elect to follow its reasoning:[3]

> On appeal, AK Steel argues the ALJ erred in failing to apportion some of [the employee's] hearing impairment to the effects of the natural aging process. [AK Steel] submits that since KRS 342.7305 requires at least an 8% whole person impairment before an employee may receive an award, that had the ALJ apportioned part of the impairment as due to the natural aging process, Daniels's claim would be rendered noncompensable. AK Steel points to the definition of "injury" found in KRS 342.0011(1) which states:
>
> "Injury" when used generally, unless the context indicates otherwise, shall include an occupational disease.[4]
>
> . . . .
>
> It argues therefore that the ALJ erred in failing to apply the natural aging exclusion

[2] Interestingly, even the employer, AK Steel; the university evaluator, Dr. Windmill; and the percentage impairment, 8%, are the same in both Daniels and the present case."

[3] It should be noted that in Daniels, the Panel adopted the Board's reasoning as its own; hence, the quoted portions were originally contained in the Board's decision in the Daniels case.

[4] We note that KRS 342.0011 also states that "'Injury' does not include the effects of the natural aging process[.]"

to Daniels's occupational hearing loss claim. In response, [the employee] argues that since KRS 342.7305 does not contain a specific exclusion for the natural aging process, the ALJ did not err.

The Supreme Court in Alcan Foil Products v. Huff, Ky. App., 2 S.W.3d 96 (1999), noted that depending on the proof a hearing loss could be either an injury or an occupational disease. We recognize that the definition of injury as contained in KRS 342.0011(1) includes an occupational disease. We believe further, however, that because of the difficulty in categorizing hearing losses that the Legislature, by the creation of KRS 342.7305, established that a hearing loss was in reality its own entity containing elements of both an injury and occupational disease and by this establishment created a compensable condition which upon a showing of work-connectedness is controlled by the specific language of that section.

. . . .

Although the ALJ concluded the natural aging language as contained in the statutory definition of injury was not applicable because he considered this an occupational disease, we reach the same conclusion except we believe it is not applicable because hearing losses were intended to be controlled by the specific provisions of KRS 342.7305.

The definition of injury is a general statutory provision. Alternatively, the provision dealing with hearing loss is specific. If in an application there appears to be an apparent conflict between two statutory provisions dealing with the same matter, the specific provision is controlling over the general. See Boyd v. C & H Transport, Ky., 902 S.W.2d 823 (1995). Further, in considering statutory

construction, one considers not only what is said but also what is not said. If the Legislature excludes certain items but does not exclude others, then it is presumed they did so with intent. [Palmer v. Commonwealth, Ky., 3 S.W.3d 763, 764 (1999).] Here, the intent is shown specifically, in our opinion, at KRS 342.7305(2) wherein the Legislature mandates that in order to have a compensable hearing loss there must be at least an 8% impairment and in considering that impairment tinnitus is excluded. By excluding tinnitus but at the same time excluding no other condition, we believe it was clearly the intent of the Legislature that "natural aging" to the extent that it applies in a hearing loss is not excluded. There is, we believe, a logic to this legislative intent. The Legislature first obligates that there be an establishment of impairment related to work either in a single traumatic event or repetitive exposure to hazardous noise. The Legislature further recognize[d] that some levels of hearing impairment (less than 8%) is [sic] occupationally insignificant. If, however, the occupational impact in combination with other conditions, excluding tinnitus, are at 8% or above then the work has proximately caused a level of impairment that is vocationally significant. We further believe it is a recognition of the Legislature that the hearing loss impairment of repetitive exposure to hazardous noise will most frequently occur in older workers. As one ages, it can be expected there will be some degree of reduction in hearing. However, absent the occupational contribution of the noise exposure, the individual would not reach that level of impairment for which compensability is assessed pursuant to KRS 342.7305. We therefore conclude that the statutory provision notwithstanding what questions may have existed on the medical form created by the Department is controlling and loss particularly related to age is not at issue

> once it is established that there is work-related hearing loss.
>
> Although not directly addressed by either the ALJ or the parties, we would note that it was not incumbent upon the ALJ to grant presumptive weight to all aspects of Dr. Windmill's report. Any medical report, including medical reports pursuant to KRS 342.315, are likely to contain multiple opinions. While a report and all of its opinions may be accepted by an ALJ, the ALJ continues to have the authority to pick and choose from those opinions. Codell Construction Co. v. Dixon, Ky., 478 S.W.2d 703 (1972). Of course, if it is an opinion offered by a University evaluator and thus entitled to presumptive weight, if the ALJ chooses to reject a portion of the University evaluator's opinions then he must provide a reasonable basis for doing so in accordance with Magic Coal Co. v. Fox, et al, Ky., 19 S.W.3d 88 (2000).

AK Steel argues that the Daniels decision is flawed because it failed to take into account KRS 342.730(1)(e). KRS 342.730(1)(e) provides, in relevant part, as follows:

> For permanent partial disability, impairment for nonwork-related disabilities, . . . and hearing loss covered in KRS 342.7305 shall not be considered in determining the extent of disability or duration of benefits under this chapter.

Since KRS 342.7305(2) provides that "[i]ncome benefits for occupational hearing loss shall be as provided in KRS 342.730 . . ." AK Steel argues that the hearing loss statute expressly excludes consideration of "nonwork-related

disabilities . . . in determining the extent of disability or duration of benefits under [Chapter 342]."

We construe the provision of KRS 342.7305(2) that "income benefits for occupational hearing loss shall be as provided in KRS 342.730 . . ." as meaning simply that the calculation of benefits for a hearing loss impairment is to be the same as the calculation of benefits for a non-hearing loss impairment under KRS 342.730. Further, KRS 342.730(1)(e) excludes hearing loss covered in KRS 342.7305 from a general determination of permanent partial disability, supporting the rationale in Daniels that KRS 342.7305 is a specific statute which is to control over a general statute such as KRS 342.730(1)(e).

AK Steel also argues that the Board's decision in a recent case, AK Steel v. Jack Mealey, Claim No. 02-00217, undermines the reasoning of Daniels.[5] While we would not be bound by the Board's decision in Mealy, nevertheless, we agree with the Board that Daniels and Mealey are distinguishable and adopt the Board's discussion of this issue as our own:

> In Mealy, supra, the Board reversed the ALJ's opinion that the statute of limitations contained in KRS 342.185 for injury claims did not apply to hearing loss claims under KRS 342.7305. As properly pointed out by AK Steel, the rationale for

[5] The Board's decision in Mealy is currently on appeal to this Court, See Mealy v. AK Steel, Case 2003-CA-000027, and AK Steel v. Mealy, Case No. 2003-CA-000202-MR.

the ALJ's holding was that the specific statue governing hearing loss claims (KRS 342.7305), did not contain a statute of limitations provision. Therefore, the ALJ determined that the specific statute controlled over the general injury statute of limitations was [sic] contained in KRS 342.185 and reasoned that hearing loss claims were subject to no limitations period whatsoever. In reversing the ALJ in Mealey, supra, the Board affirmed that "occupational hearing loss is a cumulative trauma within the context of the definition of injury provided in KRS 342.0011(1)." Thus we reasoned that the lack of a specific limitation provision in KRS 342.7305 was of no consequence.

By analogy, AK Steel now argues that the Board erred in its earlier analysis in Daniels, supra, with regard to the natural aging language also contained in KRS 342.0011(1). We disagree and stand by our earlier ruling in Daniels as affirmed by the court of appeals. As stated above, KRS 342.7305 contains a specific exclusion for tinnitus, but does not mention any exclusion for the natural aging process. By contrast, there is no specific statutory language contained in KRS 342.7305 regarding a separate statute of limitations for hearing loss claims. Hence, we continue to believe that the general statute of limitations for injury claims contained in KRS 342.185 controls hearing loss claims because no specific limitations provision for hearing loss claims exists elsewhere. By contrast KRS 342.7305 does contain specific language regarding exclusion of certain medical conditions that does not include impairment due to the natural aging process. As we stated in Daniels, supra, since there appears to be an apparent conflict between two statutory provisions dealing with the same subject matter, as a matter of law the specific provision in KRS 342.7305 must be considered controlling over the general

> language contained in KRS 342.0011(1). Boyd v. C & H Transport, supra.

Next, AK Steel contends that the ALJ erred by applying the times-two multiplier contained in KRS 342.730(1)(c)2 when Allen had retired and never returned to work. KRS 342.730(1)(c)2 provides as follows:

> 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. This provision shall not be construed so as to extend the duration of payments.

AK Steel argues that the clear and unambiguous language of the statute compels a finding that the times-two multiplier should apply only in the event an employee had returned to work at a same or greater wage and, subsequently, ceased that employment for whatever reason. According to AK Steel, the statute has no application to a situation in which the employee never returns to employment at an equal or greater wage as is the situation in this case. AK Steel asserts that KRS 342.730(1)(c)2 is simply not triggered unless, “an employee

returns to work at a weekly wage equal to or greater than the average weekly wage at the time of the injury . . . .” AK Steel contends that only then, “during any period of cessation of that employment,” is the employee entitled to the times-two multiplier. Under AK Steel’s interpretation, reference to “that employment” in the second sentence can only be interpreted to refer to “that employment” referenced in the first sentence, i.e., employment to which the plaintiff has returned at the same or greater wage.

In affirming the ALJ, the Board relied upon, and quoted extensively from, this Court’s unpublished opinion in Laurel Cookie Factory v. Forman, Case No. 2002-CA-000608-WC, opinion rendered September 20, 2002. In that case a Panel of this Court held that an injured employee was eligible to receive the times-two multiplier contained in KRS 342.730(1)(c)2 even though the employee did not return to work following her work-related injury. We note that on October 7, 2003, in an unpublished opinion, the Supreme Court reversed the interpretation of KRS 342.730(1)(c)2 expressed by the Panel in Case No. 2002-CA-000608-WC. See Laurel Cookie Factory v. Forman, Case No. 2002-SC-0867-WC, opinion rendered September 18, 2003, modified October 7, 2003. The decision in the Supreme Court case became final on January 22, 2004. Because the Supreme Court decision was unpublished, it cannot be cited as

legal authority and we are not bound by its holding. CR 76.28(4)(c).

In his opinion and award, the ALJ stated "[a]ddressing whether plaintiff has the physical capacity to return to the type of work performed at the time of the injury due to hearing loss, it appears to the undersigned and the undersigned so finds that, based upon the testimony of Dr. Windmill, the plaintiff can return to the type of work performed at the time of the injury." The record further discloses that Allen did not return to the type of work previously performed at AK Steel, and that Allen did not, in fact, return to any type of employment.

Since the inception of the Act, income benefits have been awarded on the basis of occupational disability. In Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968), the Court defined occupational disability, taking into account various factors that result in a loss of wage-earning capacity following an injury. That definition was later codified in KRS 342.0011(11), and KRS 342.730(1) authorized income benefits based upon the percentage of occupational disability.

In 1996, KRS 342.0011(11) was amended as part of a major revision of the Act. At the same time, KRS 342.0011(34), (35), and (36) were enacted, and KRS 342.730(1)(b) and (c) were amended. As a result, partial disability was re-defined to

require both a permanent disability rating and an ability to work. A table found in KRS 342.730(1)(b) listed a factor for various ranges of AMA impairment, with the factor increasing as the corresponding range of impairments increased. As set forth in KRS 342.0011(36), the worker's percent of impairment and the corresponding factor were multiplied to arrive at a disability rating from which the income benefit was determined. KRS 342.730(1)(c)1 provided for a 50% increase in the benefit of an individual who did not retain the physical capacity to return to the previous type of work, and KRS 342.730(1)(c)2 provided for a 50% reduction in the benefit of a worker who returned to work at a wage that equaled or exceeded the wage when injured. Thus, the benefit of an individual who retained the physical capacity to return to the previous type of work but failed to do so was calculated under KRS 342 .730(1)(b) and was neither enhanced nor reduced.

Effective July 14, 2000, the method for awarding permanent partial disability benefits was amended again. The factors contained in KRS 342.730(1)(b) were decreased. KRS 342.730(1)(c)1 was amended to provide for a triple benefit if the worker did not retain the physical capacity to return to the previous work, with KRS 342.730(1)(c)3 providing additional multipliers based upon age and education. In addition, KRS

342.730(1)(c)2 was amended to its current language, including the provisions for a times-two enhancement.

As under the 1996 amendments, KRS 342 .730(1)(b) and (c) provide a system for calculating partial disability benefits. KRS 342.730(1)(b) continues to provide for a basic partial disability benefit, but because the factors are smaller than under the 1996 Act, the benefit is smaller. Under KRS 342.730(1)(c)1 and 3, an individual who does not retain the physical capacity to return to the previous type of work receives triple the basic benefit and may be entitled to additional multipliers based upon age and education. Whereas, under KRS 342.730(1)(c)2, an individual who returns to work earning the same or greater wage receives the basic benefit but is entitled to a double benefit for any period that the employment ceases, regardless of the reason .

When determining that KRS 342.730(1)(c)2 authorized a double benefit on these facts, the ALJ and the Board failed to address the implications of the finding that the claimant retained the physical capacity to return to his previous work and the fact that he failed to attempt any type of work after his injury. KRS 342.710(1) states that one of the primary goals of Chapter 342 is to encourage injured workers to return to work, preferably with the same employer and to the same or similar work. A traditional means for encouraging this has been

to limit income benefits for partial disability to two-thirds of the worker's average weekly wage, up to a maximum of 75% of the state's average weekly wage, so that it was less profitable to be disabled than to be employed. Although the 1996 and 2000 versions of KRS 342.730(1)(b) and (c) retain the same maximums, they also provide a financial incentive for partially disabled workers who retain the physical capacity to return to the type of work they performed until the injury to do so. Consistent with the policy of awarding benefits in proportion to occupational disability, the greatest benefits are provided to those workers who do not retain the physical capacity to do so, for those are the workers who would be expected to suffer the greatest wage loss due to their injuries.

The 1996 version of KRS 342.730(1)(b) and (c) provided a basic benefit for those who retained the physical capacity to return to the previous type of work and provided an enhanced benefit to those who lacked the physical capacity to return to their previous work. Furthermore, because individuals who returned to work at the same or greater wage were permitted to receive a partial income benefit in addition to their post-injury earnings, the statute provided a financial incentive for workers who retained the physical capacity to return to their previous work to do so. The apparent goal of the

2000 amendments is to provide an even greater incentive for that group of workers to return to their previous type of work and, presumably, to earn the same or a greater wage than when injured. Thus, those who fail to do so are limited to the basic benefit under KRS 342.730(1)(b), with the benefit based upon a lower statutory factor than under the 1996 Act. In contrast, those who return to work at the same or a greater wage are permitted to receive the basic income benefit in addition to their earnings. Furthermore, they are assured a double benefit during periods that the employment is not sustained, regardless of the reason. Thus, workers who retain the physical capacity to perform their previous work are rewarded for attempting to do so even if the attempt later proves to be unsuccessful.

After reviewing the lay and medical evidence, the ALJ determined that the claimant retained the physical capacity to return to his previous work. Allen, however, made no attempt to return to his previous work or any other work. Under those circumstances, Allen is entitled to receive only the basic income benefit that is provided in KRS 342.730(1)(b).

The decision of the Board is affirmed in part and reversed in part, and the claim is remanded to the ALJ for the entry of an award of income benefits which excludes the times-two multiplier contained in KRS 342.730(1)(c)2.

ALL CONCUR.

BRIEF FOR APPELLANT:

Christopher A. Dawson
Vanantwerp, Monge, Jones & Edwards
Ashland, Kentucky

BRIEF FOR APPELLEE:

Robert G. Miller, Jr.
Perry, Preston & Miller
Paintsville, Kentucky