

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002435-WC

AUDUBON METALS, LLC

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-65407

BERNARD THOMAS, JR.;
HON. DONALD G. SMITH, ADMINISTRATIVE
LAW JUDGE; AND THE WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: DYCHE, McANULTY, AND SCHRODER, JUDGES.

McANULTY, JUDGE. Audubon Metals, LLC, seeks review from an order of the Workers' Compensation Board, entered October 15, 2003, reversing a decision of the Administrative Law Judge (ALJ) regarding the commencement date of an award of permanent partial disability benefits to Bernard Thomas Jr. The issue on appeal is whether the Board properly characterized this determination as a matter of law rather than fact.

Thomas is employed as a maintenance mechanic at Audubon. On October 16, 2000, he was injured when a part dislodged from some hydraulic machinery on which he was working and struck him in the face. His eye, nose, jaw and teeth were seriously injured and he required immediate surgery. As a result of the injury, Thomas was unable to resume working until December 26, 2000. When he returned to work, he was placed on light duty for some time. He then resumed regular duty although he has required the assistance of Billy Jones, a fellow employee, to perform his job. Thomas missed one week of work in September 2002, for dental surgery related to the injury. On December 10, 2002, he filed an application for resolution of injury claim with the Department of Workers' Claims.

After considering several physicians' reports and the deposition of Billy Jones, and hearing testimony from Thomas and Thomas' supervisor, the Administrative Law Judge (ALJ) awarded temporary total disability benefits for the period immediately following the accident when Thomas was unable to return to work (October 17, 2000 through December 25, 2000) and for the week Thomas had his dental surgery (September 12, 2002 through September 18, 2002). The ALJ also awarded permanent partial disability income benefits based on a 36 percent impairment rating beginning on September 19, 2002, and continuing until

Thomas qualifies for old age Social Security retirement benefits.

Thomas thereafter filed a motion for reconsideration, requesting an award of permanent partial disability benefits for the period between December 26, 2000, (when he returned to work following his injury) and September 11, 2002, (the commencement of the week he was away from work for the dental surgery). The motion was denied and Thomas subsequently appealed to the Workers' Compensation Board.

In reviewing the ALJ's opinion, the Board found that the ALJ had erred as a matter of law in failing to award permanent partial disability benefits for the period immediately following the first period of total temporary disability. The Board reversed the ALJ's decision and remanded the case for an award of permanent partial disability benefits commencing on December 26, 2000. This appeal by Audubon followed.

Audubon argues that the starting date of the permanent partial disability was a factual determination within the discretion of the ALJ. Audubon maintains that the Board therefore exceeded the scope of its review when it substituted its judgment for that of the ALJ as to the weight of evidence on a question of fact. Audubon further argues that the ALJ made adequate findings of fact to support the determination that the

permanent partial disability benefits were to be awarded from September 19, 2002.

The duty of this Court is to correct the Board only where it has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992); Whittaker v. Rowland, Ky., 998 S.W.2d 479, 482 (1999).

We agree with the Board that, as a matter of law, in most cases the period of permanent partial disability will immediately follow the period of total temporary disability.

Although our review of the Board's statutory interpretations is less deferential than our review of its factual determinations, Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116 (1991), nevertheless, an administrative agency's construction of its statutory mandate, particularly its construction of its own regulations, is entitled to respect and is not to be overturned on appeal unless clearly erroneous. J.B. Blanton Company, Inc. v. Lowe, Ky., 415 S.W.2d 376 (1967).

Homestead Nursing Home v. Parker, Ky. App, 86 S.W.3d 424, 426 (1999).

The Board based its decision on the statutory provisions that govern the award of income benefits, stating as follows: "When read together, we believe KRS 342.730(1)(b) and KRS 342.730(1)(d) require, in most instances, that the payment

of permanent partial disability begins following the period of TTD [total temporary disability] when a claimant first returns to work."

KRS 342.730(1)(b) provides in relevant part as follows:

[I]ncome benefits for disability shall be paid to the employee as follows:
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 . . . Any temporary total disability period within the maximum period for permanent, partial disability benefits shall extend the maximum period** [.]
(Emphasis added.)

KRS 342.730(1)(d) governs the length of the payment period, stating as follows:

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 of the impairment or disability** exceeding fifty percent (50%) arises.
(Emphasis added.)

The Board also relied on the definition of temporary total disability found in KRS 342.0011(11)(a). It states:

"Temporary total disability" means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment[.] KRS 342.0011(11)(a).

We agree with the Board that the language of these statutes supports the general principle that the period of permanent partial disability will immediately follow the injury or the period of temporary total disability caused by the injury. Furthermore, KRS 342.730(1)(b) clearly envisions that periods of temporary total disability (such as the week of Thomas' dental surgery) may occur within periods of permanent partial disability.

The Kentucky Supreme Court has also indicated that periods of total temporary disability and permanent partial disability are generally contiguous.

Awards of temporary total disability are appropriate when a worker is totally disabled by the effects of a compensable injury but has not yet reached MMI [maximum medical improvement], a term that refers to the time at which the worker's medical condition has stabilized so that any remaining physical impairment and occupation disability can be viewed as being permanent.

Clemco Fabricators v. Becker, Ky., 62 S.W.3d 396, 397-98 (2001) citing W.L. Harper Construction Company, Inc. v. Baker, Ky. App., 858 S.W.2d 202 (1993). See also Pierson v. Lexington Public Library, Ky., 987 S.W.2d 316, 319 (1999).

TTD [temporary total disability] exists only until a worker's condition stabilizes so

that the extent and duration of any permanent occupational disability can be determined, and KRS 342.730(1)(b) contemplates that periods of TTD may occur within a period of permanent, partial disability.

KI USA Corp. v. Hale, Ky., 3 S.W.3d 355, 358 (1999).

A situation could arise in which a worker made a complete recovery following a period of total temporary disability but then, after a period of time had passed, suffered a relapse and an onset of permanent partial disability. In his findings, however, the ALJ did not highlight any facts clearly distinguishing the period after Thomas' dental surgery as the time of the onset of the partial permanent disability. Audubon nonetheless argues that there was no proof of a permanent partial disability in April 2001, when Thomas was examined by Dr. Satish Shah, and that the first permanent partial disability rating did not occur until November 2002, when Dr. Chris Covington performed his examination of Thomas. Although Dr. Shah stated that Thomas "can continue to work at full duty at his current position with no work restrictions necessary," he also noted various physical symptoms stemming from the work injury. Furthermore, Dr. Covington's report, that the ALJ deemed the "most persuasive," stated that "the patient was sent over today for consultation in regards to an impairment rating and [in] regards to his **original work related injury back on**

10/16/00." (Emphasis added.) The ALJ also found that Billy Jones has worked with and assisted Thomas on an almost daily basis since he first returned to work following the injury, because Thomas has difficulty walking and lifting.

Based on these findings of fact, we do not think the Board "committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital, 827 S.W.2d at 688.

For the foregoing reasons, the order of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

R. Christion Hutson
Whitlow, Roberts, Houston &
Straub, PLLC
Paducah, Kentucky

BRIEF FOR APPELLEE:

Sidney H. Hulette
Hulette & Arnett, LLP
Morganfield, Kentucky