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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002649-WC

THOMAS E. BRISTOE — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-02-80683

NEWSOME MILLRIGHT SERVICE;
HON. JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSTATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; TACKETT, JUDGE; AND EMBERTON, SENIOR JUDGE.[1]

TACKETT, JUDGE: Thomas E. Bristoe petitions for review of an opinion of the Workers' Compensation Board that affirmed in part, reversed in part, and remanded an opinion and order of the Administrative Law Judge awarding Bristoe permanent partial occupational disability benefits. Bristoe challenges that portion of the Board's opinion reversing the ALJ's

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

interpretation of Kentucky Revised Statute (KRS) 342.730(1)(d) for determining Bristoe's maximum average week wage and remanding the case for recalculation of his weekly benefits. Finding no error, we affirm.

In July 2002, Bristoe was 52 years of age and employed by Newsome Millright as a millright welder installing grain moving equipment and feed production equipment. His job duties included welding and cutting with torches; hanging cable; setting up scaffolding; erecting elevator legs and super structures; and carrying tools, parts, and equipment. Bristoe often had to operate tools above-ground holding onto ladders, scaffolding, or infrastructure with one hand, while holding tools in the other hand. On July 22, 2002, while installing a heavy-duty auger, the auger dislodged and amputated his left thumb. He was immediately flown to Louisville, where his thumb was re-attached, but the surgery was unsuccessful and the thumb later had to be re-amputated because of bad circulation. In addition to the obvious problems of grasping objects due to the absence of his left thumb, Bristoe experiences numbness in his index finger and stiffness in his second finger. On October 1, 2002, Bristoe returned to work with Newsome Millright at the same wage rate in a similar position as before the injury, but he was unable to perform the same tasks, especially those above-ground.

On October 29, 2002, Bristoe filed an application for resolution of injury claim based on the injury to his left hand resulting from the amputation of his left thumb. Dr. Amit Gupta, a hand specialist, who initially operated on and treated Bristoe, assessed a permanent partial disability rating of 22% of the body as a whole under the American Medical Association's (AMA) Guides to the Evaluation of Permanent Injury, Fifth Edition. Bristoe also submitted a report from Dr. Pearson Auerbach, an orthopedic surgeon, who assessed a 27% permanent partial disability rating under AMA Guides.

At the evidentiary hearing held on April 29, 2003, the parties contested the extent and duration of the injury, and the calculation of benefits under KRS 342.730. The parties stipulated that Bristoe's average weekly wage at the time of the injury was $508.79. On June 3, 2003, the ALJ issued an opinion awarding Bristoe permanent partial disability benefits of $395.64 per week under KRS 342.730 after accepting Dr. Auerbach's 27% disability impairment rating and finding that Bristoe is not able to return to the same type of job following the injury.

Newsome Millright filed two motions to reconsider contesting the calculation of the weekly benefits arguing they were limited to 99% of 66 2/3% of Bristoe's average weekly wage. The ALJ denied the motions to reconsider stating the amount

awarded was proper because it did not exceed 100% of the state's average weekly wage. The ALJ calculated the benefit amount utilizing the formula and factors set out in KRS 342.730(1)(b) as follows: $508.79 (the average weekly wage) X 2/3 (66 2/3% of average weekly wage)[2] X 27% (the AMA disability impairment rate)[3] X 1.35 (the statutory factor for the prescribed impairment rate)[4] X 3.2 (the statutory 3 multiplier plus .2 multiplier for age).[5] Under KRS 342.730(1)(b), the calculation should include the lesser of 66 2/3% of the worker's average weekly wage or 75% of the state's average weekly wage. The ALJ utilized the former figure without discussing the latter figure. The record indicates that the state's average weekly wage in 2002 was $550.66, so 75% of the state's average weekly wage equals $412.99. 66 2/3% of Bristoe's average weekly wage of $508.79 equals $339.19. Therefore, the ALJ's initial calculation under KRS 342.730(1)(b) using the lesser of the two figures based on 66 2/3% of Bristoe's average weekly wage was correct.

On November 12, 2003, the Workers' Compensation Board entered an opinion affirming the ALJ's decision as to the appropriate disability impairment rating and the application of

[2] See KRS 342.730(1)(b).

[3] Id.

[4] Id.

[5] See KRS 342.730(1)(c) 1. and 3.

KRS 342.730(1)(c)1. with the 3 multiplier, but reversed the ALJ's calculation of the weekly benefits. The Board remanded the case for calculation of the benefits based on the limitation being 99 and 66 2/3% of Bristoe's average weekly wage. This appeal followed.

The sole issue on appeal concerns the interpretation of KRS 342.730(d) and the proper limitation on Bristoe's disability benefits. As an initial matter, we note that the interpretation of a statute is a legal question subject to de novo review on appeal. See Halls Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327, 330 (2000); Wilson v. SKW Alloys, Inc., Ky. App., 893 S.W.2d 800, 801-02 (1995). The cardinal rule of statutory interpretation is to ascertain and give effect to the legislature's intent. Hale v. Combs, Ky., 30 S.W.3d 146, 151 (2000); Magic Coal Co. v. Fox, Ky. 19 S.W.3d 88, 94 (2000). In determining legislative intent, a court must refer to the language of the statute and is not free to add or subtract from the statute or interpret it at variance from the language in the statute. Hale, 30 S.W.3d at 151 (quoting Beckham v. Board of Education of Jefferson County, Ky., 873 S.W.2d 575, 577 (1994)). Statutes should not be interpreted in a manner that would bring about absurd or unreasonable results, Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co., Ky. 983 S.W.2d 493, 500 (1998); Estes v.

Commonwealth, Ky., 952 S.W.2d 701, 703 (1997), or in such a way as to render any part of it meaningless or ineffectual, Stevenson v. Anthem Cas. Ins. Group, Ky., 15 S.W.3d 720, 724 (1999); Bob Hook Chevrolet Isuzu, Inc. v. Transportation Cabinet, Ky., 983 S.W.2d 488, 492 (1998). "[A]ll statutes should be interpreted to give them meaning, with each section construed to be in accord with the statute as a whole." Aubrey v. Office of the Attorney General, Ky. App., 994 S.W.2d 516, 520 (1998) (quoting Transportation Cabinet v. Tarter, Ky. App., 802 S.W.2d 944, 946 (1990)). The policy and purpose of a statute should be considered in determining the meaning of the words used. Kentucky Industrial Utility Customers, 983 S.W.2d at 500; Democratic Party of Kentucky v. Graham, Ky., 976 S.W.2d 423, 429 (1998).

We begin with reference to the relevant portions of the statutory provisions.

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

> (1) Except as provided in KRS 342.730, income benefits for disability shall be paid to the employee as follows:
>
> (a) For temporary or permanent total disability, sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than one hundred percent (100%) of the state average weekly wage and not less than twenty percent (20%) of the state average weekly wage as

determined in KRS 342.740 during that disability. . . .

(b) 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 as determined by "Guides to the Evaluation of Permanent Impairment," American Medical Association, latest edition available, times the factor set forth in the table that follows:

AMA Impairment	Factor
0 to 5%	0.65
6 to 10%	0.85
11 to 15%	1.00
16 to 20%	1.00
21 to 25%	1.15
26 to 30%	1.35
31 to 35%	1.50
36% and above	1.70

(c) 1. If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments;

. . . .

> (d) . . . Benefits payable for permanent partial disability shall not exceed ninety-nine percent (99%) of sixty-six and two-thirds percent (66-2/3% of the employee's average weekly wage as determined under KRS 342.740 and shall not exceed seventy-five percent (75%) of the state average weekly wage, except for benefits payable pursuant to paragraph (c) 1. of this subsection, which shall not exceed one hundred percent (100%) of the state average weekly wage. . . . (Emphasis added).

Bristoe argues the Board erred in reversing the ALJ's calculation of benefits under KRS 342.730. He contends that the Board misconstrued subsection (1)(d) because it unambiguously provides for a higher upper limitation on benefits not to exceed 100% of the state average weekly wage where the employee cannot return to the type of work that the employee performed prior to the injury. In essence, Bristoe maintains that the "except etc." clause modifies and thereby overrides the entire preceding phrase.

On the other hand, the Board agreed with Newsome Millright's position that the "except etc." clause modifies only the immediately preceding section of the prior phrase dealing with limiting benefits to 75% of the state average weekly wage. Newsome Millright maintains that the use of the conjunction "and" in subsection (1)(d) creates two separate upper limitation figures, i.e., 99% of 66 2/3% of average weekly wage and 75% of

the state average weekly wage, with the increased upper limitation of 100% of the state average weekly wage being applicable only to the latter limitation figure. Thus, Newsome Millright asserts the Board properly calculated Bristoe's weekly benefits as being limited to $335.81 utilizing the following formula: $508.79 x 66 2/3% x 99% = $335.81.

In resolving this dilemma, we do not write on a clean slate. In Stewart v. Kiah Creek Mining, Ky., 42 S.W.3d 614 (2001), the Kentucky Supreme Court reviewed KRS 342.730[6] and the calculation of disability benefits under the formulae set forth therein. The Court held that subsection (1)(d) created upper limitations or maximums for the benefit amount and duration in calculating permanent partial disability benefits. With respect to the amount calculation, the Court stated that KRS 342.730(1)(d), "limits the maximum benefit for partial disability to 99% of 66 2/3% of the worker's average weekly wage and also limits it to 75% of the state's average weekly wage unless KRS 342.730 (1)(c)1. applies, in which case the benefit is limited to 100% of the state's average weekly wage." Id. at 617. The Court recognized that KRS 342.730(1)(a) limits

[6] The Kiah Creek Mining decision dealt with the 1996 version of the statute. The statute was subsequently amended to increase the statutory modifier in subsection (1)(c) from 1.5 to 3 and add age and education modifiers in subsection (1)(c)3. However, the basic method of calculation remains similar in the current version of the statute and the differences do not significantly affect the rationales expressed in Kiah Creek Mining to our situation. Most notably, the language in subsection (1)(d) is the same in the current version as in the 1996 version.

benefits for total disability initially to 66 2/3% of the worker's average weekly wage up to a maximum of 100% of the state's average weekly wage. It noted that permanent partial impairment rates could theoretically exceed 100% when multiplied by the statutory factors in KRS 342.730(1)(b), which could result in benefits exceeding those for total disability. Id. The Court's methodology for calculating permanent partial disability benefits under KRS 342.730(1)(b) included multiplying the disability rating (the AMA Impairment rate plus the statutory factor) by 66 2/3% of the worker's average weekly wage or 75% of the state's average weekly wage, whichever is less; then under subsection (1)(d) "limit the benefit to a maximum of 99% of 66 2/3% of the worker's average weekly wage and 100% of the state's average weekly wage because KRS 342.730(1)(c)1. applies." Id. at 618. In other words, a permanent partial disability award that is enhanced under KRS 342.730 (1)(c)1. may not exceed either 99% of 66 2/3% of the worker's average weekly wage or 100% of the state's average weekly wage.

A careful review of all of the provisions of KRS 342.730 supports the position that permanent partial disability benefits should be limited to either 99% of 66 2/3% of the worker's average weekly wage or 100% of the state's average weekly wage, whichever is less. For instance, under KRS 342.730(1)(c) total disability benefits are based on 66 2/3% of

the average weekly wage but not more than 100% of the state's average weekly wage. In other words, total disability benefits are based initially on 66 2/3% of the claimant's average weekly wage and only if that amount is equal to or exceeds 100% of the state's average does he become entitled to receive the latter amount. Similarly, under KRS 342.730(1)(b) partial disability benefits are likewise based initially on 66 2/3% of the worker's average weekly wage but not more than 75% of the state's average weekly wage; so only if the 66 2/3% average weekly wage amount equals or exceeds 75% of the state's average weekly wage is the claimant entitled to the latter amount. The state's average weekly wage figure constitutes a restriction or maximum amount limiting the benefits recoverable by higher wage workers.

From this perspective, the benefits sentence in KRS 342.740(1)(d) should be construed consistently with the approach in subsections (1)(a) and (1)(b). Subsection (1)(d) provides for limitation of partial disability benefits at a maximum level below that of total disability benefits. KRS 342.730(1)(a) limits total disability benefits to 66 2/3% of the worker's average weekly wage or 100% of the states average weekly wage. The calculation of partial disability benefits under KRS 342.730(1)(b) begins with the lesser of 66 2/3% of the worker's average weekly wage or 75% of the state's average weekly wage, which then is adjusted for the percentage of impairment and

statutory factor. Generally, these modifications will result in a reduction in the benefit amount until the impairment reaches the level of approximately 59% or above, which would result in an impairment percentage exceeding 100%. See KRS 342.730(1)(b) (table providing for factor of 1.70 for AMA Impairment of 36% and above). Furthermore, where the employee cannot return to the type of work he performed prior to the injury, the partial disability benefits amount is also further enhanced under KRS 342.730(1)(c)1. by the 3 multiplier further substantially increasing the benefit amount to levels that could readily exceed the amount available for total disability.[7] The terms in subsection (1)(d) mirror those in subsections (1)(a) and (1)(b), and the reference in subsection (1)(d) to 99% of 66 2/3% of the worker's average weekly wage suggests some intent to limit partial disability benefits to an amount just slightly below those for total disability unless they rise to the level of 75% of the state's average weekly wage or 100% of the state's average weekly wage where the worker cannot return to his prior job. Bristoe's position would eliminate the limitation based on 99% of 66 2/3% of the average contrary to the method for determining the limitations on total disability. We believe the "except etc." clause in subsection (1)(d) was intended to raise

[7] In fact, the enhancers for partial disability raise the effective impairment rate to the extent that benefits for an AMA impairment of 26% or more are approximately equivalent to an actual functional impairment percentage of 105%.

the limitation of 75% of the state's average weekly wage to 100% commensurate with totally disabled workers under subsection (1)(a) where the partially disabled worker is unable to return to his prior type of work but not eliminate the limitation of 66 2/3% of the individual workers average weekly wage contained in both subsection (1)(a) and (1)(d). The interpretation of KRS 342.730(1)(d) that best comports with the reasonable purpose of restricting partial disability benefits to a maximum level approximately commensurate to total disability and the other subsections of the statute is to impose a limitation on partial disability benefits for claimants who cannot return to the work they performed at the time of their injury to either 99% of 66 2/3% of the employee's average weekly wage or 100% of the state's average weekly wage, whichever is less.

In the current case, the ALJ awarded Bristoe permanent partial disability benefits of $395.64. Under KRS 342.730(1)(d), Bristoe's benefits cannot exceed the lesser of 99% of 66 2/3% of his average weekly wage of $508.79, which would be $335.81, or 100% of the state's average weekly wage, which was $550.66 for the year 2002. As a result, the Board did not err in reversing the ALJ's and remanding the case for an award of weekly benefits of $335.81.

For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ched Jennings
Louisville, Kentucky

BRIEF FOR APPELLEE NEWSOME MILLRIGHT SERVICE:

Douglas A. U'Sellis
Louisville, Kentucky