

RENDERED: AUGUST 25, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001750-WC

SIDNEY COAL COMPANY, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-78170

NORMAN CHARLES; HONORABLE
MARCEL SMITH, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

AND:

NO. 2005-CA-002228-WC

NORMAN CHARLES

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-78170

SIDNEY COAL COMPANY, INC.;
HONORABLE MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

OPINION
AFFIRMING APPEAL IN PART;
REVERSING IN PART AND REMANDING

** ** * * * * *

BEFORE: TAYLOR AND VANMETER, JUDGES; EMBERTON,¹ SENIOR JUDGE.

EMBERTON, SENIOR JUDGE: This appeal and cross-appeal stem from an opinion of the Workers' Compensation Board reversing the Administrative Law Judge's order directing the claimant Norman Charles to reimburse the employer Sidney Coal for temporary total disability benefits paid and affirming the denial of Charles's claim for future medical benefits. We affirm the Board's decision as to reimbursement but conclude that the recent opinion of this Court in Combs v. Kentucky River Health District² requires reversal on the denial of future medical benefits.

The claimant Norman Charles suffered two separate injuries to his shoulder in the course of his employment as a scoop operator with appellant Sydney Coal Company on August 9 and August 10, 2001. After seeking medical treatment, he was off work for two weeks and then returned to light-duty work until he was laid off on February 23, 2002. Charles testified at the hearing on his claim that he was paid temporary

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.

² ____S.W.3d ____ (rendered February 10, 2006).

disability benefits after he was laid off because he was still under a doctor's care. He also admitted working during the time he was receiving TTD benefits as a computer customer service representative, as an employee of a company repossessing four-wheelers, and as an employee of a used car lot, washing, detailing and fueling automobiles.

Charles underwent two surgical procedures on his shoulder. The first was performed by Dr. Steven Shockey on January 31, 2002, and the second by Dr. Ben Kibler in July 2003. He testified at the hearing that although he was still working for the car lot, he was having significant difficulties with his shoulder. After reviewing the lay and medical evidence in the record, the ALJ concluded that Charles suffered no permanent disability as a result of the shoulder injuries. In reaching that determination, the ALJ relied upon the opinion of Dr. Timothy Wagner who evaluated Charles on May 8, 2003, and again on May 6, 2004. Dr. Wagner's impression after the second evaluation was that Charles had reached maximum medical improvement and that he could continue his job with the auto dealership. He assessed a 0% impairment rating and placed no restrictions on Charles's work activities and was of the opinion that Charles retained the physical capacity to return to his former job.

Although the ALJ dismissed Charles's claim for permanent partial disability benefits, she was nevertheless convinced that he was entitled to an award of temporary total disability benefits. However, because Charles had returned to work for a different employer while continuing to receive TTD benefits, the ALJ concluded that Sidney Coal had made a voluntary overpayment and ordered Charles to reimburse the employer a total of \$30,744.06, representing payments of \$530.07 per week for the period from September 23, 2002, through October 31, 2003. She made a specific finding, however, that there was insufficient evidence of wrongdoing on Charles's part to invoke the provisions of KRS 342.335 regarding false or fraudulent claims or the penalty provisions of KRS 342.990. On petition for reconsideration, the ALJ clarified the periods for which Sidney was entitled to reimbursement of TTD benefits and denied Charles's request for an award of reasonable and necessary future medical benefits.

On appeal, the Board reversed the order requiring Charles to reimburse Sidney stating that no statutory provision requires an employee receiving temporary income benefits to give notice of return to work as is the case with an award of permanent income benefits under KRS 342.730(7). The Board set out the following rationale for its reversal of the ALJ's decision as to reimbursement:

Furthermore, KRS 342.990(11) states that in addition to the penalties provided in this section, the commissioner and any administrative law judge or court of jurisdiction may order restitution of a benefit secured through conduct proscribed by this chapter.

Here, the ALJ specifically determined Charles did not commit any conduct which rose to the level to invoke the penalties of KRS 342.990. In other words, the ALJ made the express finding that Charles did not engage in any conduct that was proscribed by the statute. Outside of KRS 342.990, there exists no authorization under the Kentucky Workers' Compensation Act for recouping overpayment of income benefits mistakenly made when there are no past due benefits awarded. That is not to say we cannot perceive a situation where an employer, under extraordinary circumstances not present here, might also be entitled to a credit against future benefits.

We recognize the payment to Charles may be deemed a windfall. However, as the court indicated in Stratemeyer, supra, a balance must be struck between the interests of the employer against the interest of an injured worker. In situations such as the instant claim, we believe the supreme court has determined the interest of the injured worker outweighs the employer's right to recover overpayment of TTD benefits voluntarily made. Here we have a maximum wage earner who was truly injured and underwent two shoulder surgeries. He attempted and did return to little more than minimum wage work. The ALJ specifically determined Charles's actions did not rise to the level to invoke the penalties of KRS 342.990. Pursuant to the supreme court's decision in Stratemeyer, supra, without an award of past due permanent partial

disability benefits, there is simply no authority justifying an order of repayment of overpaid TTD. For the above reasons, we agree with Charles that the ALJ erred in ordering reimbursement of overpaid TTD benefits.

Sidney argues in its direct appeal that the Board erred in reversing the reimbursement decision of the ALJ, citing the definition of "temporary total disability" contained in KRS 342.0011(11)(a) and stating that there is no statutory prohibition against the type of reimbursement ordered in this case. We find this argument unpersuasive.

In Double L Construction, Inc. v. Mitchell,³ the Supreme Court of Kentucky addressed the question of whether an injured worker is entitled to TTD benefits when he continues to work at a concurrent part-time job. The claimant in that case sustained an injury in the course of his usual job as a carpenter requiring him to be off work from that job for a period of seven months. During this seven-month period, however, the claimant continued to work a concurrent part-time janitorial job. Although the facts of the instant case differ slightly from Mitchell in that we are dealing with a return to minimal work after a lay-off, we are convinced that the analysis with respect to entitlement to TTD benefits is equally applicable here.

³ 182 S.W.3d 509 (Ky. 2005).

In concluding that Mitchell was entitled to TTD benefits despite the fact that he continued to work a concurrent part-time job, the Court reasoned that a claimant is entitled to TTD benefits if the work-related injury resulted in a temporary inability to perform the job **in which the injury occurred**. The fact that the claimant continued to work a concurrent job during the period of disability was not a disqualifying factor. Relying on Central Kentucky Steel v. Wise,⁴ the Court noted that while permanent disability awards require a complete inability to perform any type of work,⁵ temporary total disability awards require only that the claimant is unable to perform the job in which the injury occurred.⁶ Especially pertinent to Norman Charles's situation, the Mitchell court made clear that workers should not be penalized for attempting to perform what work they are able to do. The Court found no basis for relieving the injury employer from liability for TTD benefits simply because the worker is still able to work a concurrent job.⁷

Because we are convinced that the analysis supporting the Board's reversal of the reimbursement order falls neatly within the Mitchell rationale, we find its holding to be

⁴ 19 S.W.3d 657 (Ky. 2000).

⁵ KRS 342.0011(11)(b) and (c); KRS 342.730(1)(a) and (b).

⁶ Mitchell, 182 S.W.3d at 514.

⁷ Id.

dispositive of Sidney's appeal. Like the Board, we are convinced that Charles's ability to return to lighter minimum-wage work did not disqualify him from entitlement to TTD benefits from his primary employment. Thus, there was no basis for requiring him to reimburse Sidney for those payments.

Next, we turn to Charles's argument that he was entitled to an award of reasonable and necessary medical payments. Entitlement to future medical benefits in the absence of an award of permanent disability benefits was recently addressed by this Court in Combs v. Kentucky River District Health Department.⁸ In reversing the denial of future medical benefits to Ms. Combs under circumstances similar to those in Norman Charles's claim, this Court set forth the following rationale:

As noted by the Board and the ALJ below, the issue of whether an injured worker is entitled to future medical benefits when the subject injury does not merit an award of permanent disability income benefits was first addressed by this state's highest court in *Cavin v. Lake Construction Co.*, 451 S.W.2d 159 (Ky.1970). In *Cavin*, the claimant was injured when he tripped and fell into a ditch while carrying an 80-pound jackhammer on his shoulder. The Workmen's Compensation Board rejected Cavin's claim for disability income benefits, finding that the injury produced no occupational disability, but nevertheless awarded him further medical benefits pursuant to KRS 342.020. The former Court of Appeals (now

⁸ Supra.

the Kentucky Supreme Court) affirmed this decision, holding: "We do not believe it is necessarily inconsistent for the board to award payment of medical expenses without finding some extent of disability. It is not impossible for a non-disabling injury to require medical attention." *Id.* at 161-62. Despite the Board's belief that the conclusion in *Cavin* that future medical benefits may still be awarded in the absence of a finding of disability is mere *dicta* and "conflicts with the plain language of KRS 342.020, which confines an award for medical expenses to those expenses which 'may reasonably be required at the time of injury and thereafter during disability'" (italics in original), this proposition has been repeatedly recognized and followed by our courts—even given the sweeping legislative changes of the workers' compensation system in 1996. See *Alcan Foil Products, a Division of Alcan Aluminum Corp. v. Huff*, 2 S.W.3d 96, 99 (Ky. 1999) ("Although a finding of occupational disability is required for an award of income benefits, the onset of occupational disability has no bearing on determining the date from which the period of limitations begins to run or on determining an injured worker's entitlement to medical benefits."); *Mountain Clay, Inc. v. Frazier*, 988 S.W.2d 503, 505 (Ky.App.1998) ("It has consistently been held that an ALJ may award medical expenses even if he finds no disability because it is possible for a non-disabling injury to require medical care."). Moreover, the particular portion of KRS 342.020 noted above that was cited by the Board as being in conflict with *Cavin* was in effect well before that decision was rendered, and our predecessor court presumably was aware of it when the case was decided. While the Board may disagree with this precedent, it is still bound to follow it. See *Western Baptist Hospital, supra*. We also note that none of the cases cited to by the Board in support of its decision deals with the

specific issue of whether future medical benefits can ever be awarded in the absence of a finding of permanent disability or addresses *Cavin* in any way. Accordingly, until our Supreme Court decides to explicitly overturn its decision in *Cavin*, we will continue to abide by the principles set forth in that case. Therefore, we must reverse the Board on this issue.

Because we find this analysis applicable to Charles's claim for future medicals, we reverse the Board's decision on that issue.

Finally, as the Board pointed out in its opinion, there is ample evidence to support a conclusion that Charles may well be in need of future medical intervention despite having produced insufficient evidence to merit an award of permanent occupational disability benefits:

In addition to Dr. Wagner's report there is other evidence in the record indicating Charles might need continuing prescription medication. Dr. King, Charles's family physician, in a report dated April 22, 2004, listed current medications as: 1) Neurontin 800 mg PO t.i.d.; 2) Motrin 800 mg PO t.i.d.; 3) Zanaflex 4 mg PO b.i.d.; and 4) Lortab 7.5 PO b.i.d., #60 per month. Dr. King indicated he asked Charles to continue his current medications along with heat, home exercises and restrictions. Dr. Nadar, Charles's IME physician, indicated "he'll continue to need ongoing symptomatic treatment from time to time with analgesics and anti-inflammatory medications." Dr. Kibler, in a note dated September 23, 2003, indicated Charles needed to work on scapular control "and return to see me on an as needed basis."

On this state of the record, we are convinced that Charles was entitled to an award of reasonable and necessary future medical benefits.

Accordingly, we affirm the Board in Appeal No. 2005-CA-001750; in Appeal No. 2005-CA-002228, the opinion of the Board is reversed and the case remanded for entry of a decision in conformity with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

A. Stuart Bennett
Lexington, Kentucky

BRIEF FOR APPELLEE:

Miller Kent Carter
Pikeville, Kentucky