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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001845-WC

GARY SLATER d/b/a CAROL DALE CONTRACTING, — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-01-69346

LARRY DUNN; HON. HOWARD E. FRASIER, JR, ADMINISTRATIVE LAW JUDGE, and WORKERS' COMPENSATION BOARD — APPELLEES

AND: NO. 2006-CA-001886-WC

LARRY DUNN — APPELLANT

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GARY SLATER, D/B/A CAROL DATE CONTRACTING; HON. HOWARD E. FRASIER, ADMINISTRATIVE LAW JUDGE; WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON AND VANMETER, JUDGES.

DIXON, JUDGE: This case concerns two separate appeals from an opinion of the Workers' Compensation Board affirming the decision of the Administrative Law Judge (ALJ). We affirm.

Dunn was born November 27, 1973, and has a twelfth-grade education plus one year of college. On November 7, 2001, Dunn sustained a work-related injury while employed as a heavy equipment operator for Carol Dale Contracting. Dunn was operating a "scoop" inside a coal mine and crushed his left hand in the machinery. Dunn was treated by Dr. Thomas Wolff and had surgery to repair damage to the first three fingers of his hand on November 8, 2001. The surgical hardware in his hand was removed during a second surgery in February 2002. Dunn was released to return to work in April 2002, though he was unable to continue his job at the coal mine due to the injury. He began working at his cousin's cabinetry business and currently works at a cabinet manufacturing company owned by his parents. On January 28, 2003, Dunn, without counsel, entered into a settlement agreement with Slater for a lump sum payment of $4,235.84. The settlement figure was based on medical records and the opinion of Dr. Wolff that Dunn suffered a 4.5% partial permanent disability (PPD) and it was approved

by an ALJ. Additionally, Dunn received temporary total disability benefits for twenty weeks which totaled $10,233.98.

On May 13, 2005, Dunn filed a petition pursuant to Kentucky Revised Statutes (KRS) 342.125 to reopen his claim alleging his impairment had worsened and entitled him to increased income benefits. Dunn based his petition on an independent medical evaluation performed by Dr. Robert Johnson that showed a significant increase in pain and occupational disability since the settlement. Dunn's chief complaint was that he had no "padding" on his fingertips, which caused tremendous pain when he used his fingers. After a thorough examination of Dunn and evaluation of his medical history, Dr. Johnson assessed a total body impairment rating of 16%.

In July 2005, Slater requested that Dunn undergo a functional capacity evaluation. Dr. Wolff reviewed the study and assessed total body impairment at 7%.

The ALJ held a hearing and heard testimony from Dunn regarding his increased impairment. Further, the ALJ considered the medical reports of Drs. Johnson and Wolff. The ALJ concluded that Dr. Johnson's report was more reliable and awarded Dunn additional PPD benefits for his worsened impairment. The ALJ calculated an award of $190.82 per week. This figure included a three multiplier pursuant to KRS 342.730(1)(c)(1).[1] In reaching his conclusion, the ALJ noted that no statutory multiplier was applied to the original settlement despite the fact Dunn could not return to work in

[1] This provision reads: "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[.]"

the coal mining industry. The ALJ reduced the award by $11.63 per week as a credit to Slater for PPD benefits awarded in the initial settlement.

Both parties petitioned the ALJ for reconsideration of his decision. Slater contended he was entitled to a credit calculated using the three multiplier which the ALJ applied to Dunn's increased benefits. The ALJ agreed with Slater and amended Dunn's award to reflect a credit for PPD benefits of $34.89 per week. The ALJ overruled Slater's second argument that Dr. Johnson's report was insufficient evidence of increased impairment.

Dunn appealed to the Workers' Compensation Board alleging the ALJ erred by awarding credit in excess of the benefits Slater actually paid under the settlement agreement. Slater cross-appealed the ALJ's finding that Dr. Johnson's opinion was a proper basis for the award.

The Board affirmed the ALJ on both issues. Dunn and Slater each petitioned this Court for review of the same issues appealed to the Board.

Standard of Review

Although this case involves a reopened claim, we utilize the same standard of review applicable to the review of an original award. *See Whittaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999). The ALJ enjoys great discretion in determining what weight is to be given to evidence and in assessing the credibility of witnesses. *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). Consequently, the Board upholds the ALJ's decision unless the evidence is so overwhelmingly in the claimant's favor that no

reasonable person could agree with the ALJ. *REO Mechanical v. Barnes*, 691 S.W.2d 224, 226 (Ky. App. 1985), *overruled on other grounds*, *Haddock v. Hopkinsville Coating Corp.*, 62 S.W.3d 387 (Ky. 2001). On review, this Court gives deference to the Board's decision and only intervenes when the Board commits a flagrant error resulting in gross injustice. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

2006-CA-001886

We first address Dunn's petition. Dunn contends the Board erroneously affirmed the ALJ's determination that Slater was entitled to a greater credit of PPD benefits than he actually paid Dunn. Based on the settlement, Dunn's PPD benefits totaled $11.63 per week. Dunn argues it is incorrect to allow Slater a credit of $34.89 per week against the award for Dunn's worsened condition.

The ALJ rationalized that a three multiplier was provided by the statute and could have been utilized in Dunn's settlement computation. However, the ALJ pointed out that Dunn did not have the benefit of counsel at the time he agreed to the settlement and therefore lost a benefit otherwise available to him. When considering the award for Dunn's increased impairment, the ALJ noted the three multiplier was used to compute the award because Dunn was unable to work as a coal miner and earned a lower wage in his new employment. The ALJ determined the three multiplier also applied to Slater's credit on the new award in the interest of public policy. He reasoned,

> [t]he undersigned finds that [Dunn] did agree to a lump sum settlement and obtained the present value of benefits that could have been paid over a 425 week period, and not to give [Slater] a credit for what [Dunn] should have received would

> be to encourage claimants to settle claims without counsel, and then to immediately hire counsel and file a claim for worsening, without suffering any detriment for obtaining the advance income benefits.

The Board agreed with the rationale of the ALJ. In its opinion, the Board quoted extensively from *Whittaker*, 998 S.W.2d at 482,

> With regard to the question of credit, it must be remembered that this appeal does not concern the reopening of a litigated award. The parties agreed to the terms by which they would settle the claim for the underlying injury, and upon claimant's receipt of the agreed-upon sum, the liability of the employer and the Special Fund for whatever occupational disability existed at the time of settlement was extinguished. The figure for occupational disability which is contained in a settlement agreement represents a compromise and might or might not equal the worker's actual occupational disability at the time; therefore, additional benefits are authorized at the reopening of the settled claim only to the extent of an actual increase in the worker's occupational disability.

While *Whittaker* is factually different from the case at bar, we find it instructive on the issue of credit. In its opinion denying Dunn's claim, the Board reasoned:

> The ALJ in the case *sub judice* found that, at the time he settled his claim, Dunn had a 4.5% permanent impairment rating and did not retain the physical capacity to return to the type of work he had performed for Slater at the time of injury. Those findings are not challenged by Dunn on appeal. Thus, as a matter of law, Slater is entitled to offset any income benefits awarded on reopening by a credit equal to PPD benefits calculated under KRS 342.730(1)(c)1 and based on a 4.5% permanent impairment rating. This is precisely the credit provided by the ALJ in his order on reconsideration issued March 6, 2006, which we affirm.

Dunn disagrees with the Board's affirmance and argues the plain meaning of KRS 342.125(4) prohibits the result reached by the ALJ. The statute states in part:

> Reopening shall not affect the previous order or award as to any sums already paid thereunder, and any change in the amount of compensation shall be ordered only from the date of filing the motion to reopen.

We disagree that the statute precludes the type of credit awarded in this case, and Dunn offers no other support for his position. Curiously, after quoting KRS 342.125(4), Dunn's petition merely states:

> It is Dunn's position that based upon the facts of this claim, as well as the law, he is entitled to be fully compensated for his work-related injury, and the decisions of the ALJ and the Board must be reversed to allow him to be so compensated.

Under the circumstances presented, we do not find the Board misapplied the law to the facts of this case. Accordingly, we find the Board properly affirmed the decision of the ALJ.

2006-CA-001845

We now turn to Slater's petition for review. He contends the Board erred in affirming the ALJ's finding that Dunn suffered an increase in total body impairment. KRS 342.125 states:

> 1) Upon motion by any party or upon an administrative law judge's own motion, an administrative law judge may reopen and review any award or order on any of the following grounds:
>
> . . . .

> (d) Change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order.

Slater contends that Dunn did not prove by objective medical evidence that his condition worsened. Slater bases his argument on the premise that the ALJ improperly relied on Dr. Johnson's evaluation because Dr. Johnson did provide his own assessment of Dunn's initial impairment rating. Slater relies on *Hodges v. Sager Corp.*, 182 S.W.3d 497 (Ky. 2005), for the proposition that the claimant's impairment must be compared at two points in time: at the time of the original award and upon reopening the claim. *Id*. at 501. We agree that this concept was discussed by the *Hodges* court; however, Slater's argument contemplates an expansion of the holding with which we disagree. Slater argues that the evaluating physician, rather than the ALJ, must make the baseline comparison. We find neither *Hodges* nor any other authority suggests anyone other than the ALJ should make such findings of fact regarding the weight and credibility of the evidence. *See Magic Coal Co.*, 19 S.W.3d at 96. Consequently, we agree with the Board's well-reasoned opinion on this issue:

> We believe the reports of Drs. Wolff and Johnson, along with the testimony of Dunn, constitute substantial evidence to support the ALJ's finding of a change of disability as shown by objective medical evidence of a worsening impairment caused by Dunn's work related injury from the time of settlement to reopening. Dr. Wolff's report of December 16, 2002, establishes a permanent impairment rating of 4.5% at the time of settlement. Dr. Johnson's report of March 30, 2005, establishes a permanent impairment rating of 16% at the time of reopening. Notably, Dr. Johnson advised that there are two available methods for assessing

> impairment in this case, both of which produced a figure higher than that assessed by Dr. Wolff in 2002. Thus, even without a specific accounting of how Dr. Wolff arrived at the 4.5% figure, the ALJ reasonably could infer that Dunn's impairment had increased.
>
> It is also worth noting that Dr. Wolff himself assessed a higher percentage of impairment in 2005 than he did in 2002. Thus, notwithstanding Slater's argument to the contrary, the record is not devoid of expert testimony comparing Dunn's permanent impairment rating at the time of settlement with his permanent impairment rating at the time of reopening. It is not necessary for the physician to explain that 7% is numerically greater than 4.5%. The ALJ may reasonably infer from such evidence that the physician believes there has been an increase in impairment.

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

VANMETER, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, CONCURS IN PART AND DISSENTS IN PART BY SEPARATE OPINION.

COMBS, CHIEF JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I respectfully dissent as to the application of the 3x multiplier to the credit allowed to Slater. Since no multiplier was applied to the original settlement figure, I can find no justification for applying the 3x multiplier to the amount of $11.63 per week credited as a set-off to the original award. In multiplying that $11.63 credit by 3x, the majority is essentially conferring a windfall upon the employer in the sum of $23.26 per week – as well as imposing a penalty upon Dunn.

The ALJ openly admitted that a hypothetical, future petitioner in Dunn's circumstances would be able to file a claim without benefit of counsel and move to re-open "without suffering any detriment for obtaining the advance income benefits." Not only is the reasoning specious, but the rationale is incorrect. It is not the proper function for an ALJ to base an award on hypotheticals that may or may not occur in similar cases. His duty is to mete out justice based solely upon precedent as it applies to the claimant before him. Dunn correctly sites KRS 342.125(4) for the proposition that upon re-opening, compensation awarded is to be effective "from the date of filing the motion to reopen" and is not to be retrospective in application.

I am persuaded that the ALJ clearly erred in awarding an amount of credit far exceeding the benefits originally paid by Slater and that the Board erred in affirming the ALJ on this point. Therefore, I would vacate and remand as to this issue. I wholly concur with the sound reasoning of the majority rejecting Slater's petition for review.

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