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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001112-WC

SIGMON COAL CO., D/B/A MARION ENERGY, LLC, AS AN INSURED OF KENTUCKY EMPLOYERS' MUTUAL INSURANCE — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-03-83376

TOMMY GOOD; SIGMON COAL CO. D/B/A MARION ENERGY, LLC, AS AN INSURED OF AMERICAN MINING INSURANCE CO.; HON. LAWRENCE F. SMITH, ADMINISTRATIVE LAW JUDGE AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND MOORE, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

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

MOORE, JUDGE: Sigmon Coal (employer), an insured of Kentucky Employers' Mutual Insurance (KEMI), petitions this Court for review of the decision of the Workers' Compensation Board finding it liable for the "excess disability" attributable to a workplace injury sustained by Tommy Good. The Board affirmed an opinion and order of the Hon. Lawrence F. Smith, Administrative Law Judge (ALJ), denying a petition for reconsideration entered on December 7, 2007. After a careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The employer, as insured by KEMI, set forth the facts in its brief, and the appellee, Sigmon Coal as insured by American Mining Insurance Company (American Mining), accepted those facts. Thus, the basic facts are not in dispute.

The ALJ found that Tommy Good (Good), who was injured twice during the course of his employment with Sigmon Coal, was fifty years old and had a high school education "with vocational training in auto mechanics." Good was first injured on November 13, 2001, in the course of his employment with Sigmon Coal, while the company was insured by American Mining. At that time, he strained his neck and back and underwent a cervical fusion surgery. He returned to work in December 2002 without any restrictions. Subsequently, on May 23, 2003, Good injured himself while performing his job duties, and Sigmon Coal was then insured by KEMI. Good injured his lower back at that time.

The ALJ noted that the parties agreed "that as a result of [Good's] 2001 injury to his cervical spine, the AMA Guides dictate an impairment rating of

25%." Thus, the ALJ stated that he agreed with the opinions of James Templin, M.D., a specialist in occupational medicine, and Gregory T. Snider, M.D., who is also a specialist in occupational medicine, that Good had a "25% permanent impairment to his cervical spine pursuant to the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition." Further, because Good was able to return to work following his 2001 injury "with no restrictions and no residual symptoms," the ALJ found that Good did not "qualify for the enhancement provisions of KRS 342.730(1)(c)1 by virtue of the former injury."

Regarding the extent and duration of Good's impairment from his 2003 injury, the ALJ reviewed the opinions of four doctors and was "more persuaded by Dr. Templin's conclusions" concerning that injury. Accordingly, the ALJ found that Good had "an 8% permanent impairment resulting from the 2003 work injury."

Regarding temporary total disability (TTD), the ALJ noted that, after Good's 2001 injury, he had surgery on October 4, 2002, and did not return to work until December 2, 2002. Therefore, the ALJ held that Good was entitled to TTD benefits pertaining to that period of time.

The ALJ found that Good "enjoyed a normal medical status until" his injury in 2003, because even though he had the prior back surgery "that was ratable at 25%, he was symptom-free." Thus, the ALJ determined that Good "did not have a pre-existing active disability before his May 23, 2003 injury incident."

Further, the ALJ noted that Good was over fifty years old and had a modest education, "a relatively high impairment rating, [and] he testified that he [was] continually falling because of his low back condition [as he had] already broken his nose and knocked out some of his teeth from these falls." The ALJ found that Good was not able to "compete in the competitive job market," his "desire to work far outweigh[ed] any possible motive for secondary gain," and Good's "medical restrictions that Dr. Templin ha[d] assigned prevent[ed] him from participating in any occupational activities in which he ha[d] experience." Therefore, the ALJ concluded that Good was "totally occupationally disabled as a result of his 2003 injury which aroused the dormant condition that resulted from his 2001 injury."

American Mining was then ordered by the ALJ to pay TTD benefits to Good "at the rate of $530.07 per week from October 4, 2002, through December 1, 2002, together with interest at the rate of 12% per annum."[2] Regarding the 2001 injury, the ALJ held that Good should "recover benefits based upon a 25% functional impairment in accordance with KRS 342.730[,]" for a total award of "$114.30 per week beginning December 2, 2002, and continuing through May 23, 2003, the date of the second injury." After that date, the ALJ concluded that Good should "recover $228.60 per week from February 13, 2004, and [continuing] for a period not to exceed 425 weeks and excluding the period when he received TTD as a result of the 2003 injury."

[2] We note that Sigmon Coal, as insured by American Mining, has not filed a cross-appeal challenging this award.

As for the 2003 injury, the ALJ held that Good should recover from his employer,

> as insured by KEMI, the sum of $571.42 per week beginning May 24, 2003, and continuing for the duration of his disability. Said benefits shall not be paid for any period which [Good] was entitled to receive TTD. Pursuant to KRS 342.730(4)[,] all income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee qualifies for normal old age Social Security Retirement Benefits under the United States Social Security Act.

Finally, the ALJ concluded that Sigmon Coal, as insured by KEMI, should "take credit for any benefits paid pursuant to the award with respect to the 2001 injury during a period in which benefits overlap."

Sigmon Coal, as insured by KEMI, filed a petition for reconsideration, asking the ALJ to reconsider the weekly rate assigned for the 2003 injury on the grounds that the employer was "only liable to [Good] for a permanent disability rating based on up to 5% functional impairment." The employer contended that there was "no evidence for the finding of 8% impairment in . . . the Opinion and Award in Dr. Templin's report. Dr. Templin assigned 5% for the low back injury of May 23, 2003." Additionally, the employer argued that it could not "be held to subsidize the weekly rate on the first accident date given the ALJ's findings that there were two accidents resulting in injury to different anatomic parts of the body." Thus, the employer asked the ALJ to make a finding whether the 2003 injury, by itself, would have been totally disabling. Finally, the employer asserted

that there was "no evidence of . . . pre-existing dormant conditions prior to May 23, 2003; they were pre-existing active."

The ALJ denied the employer's petition for reconsideration. Specifically, the ALJ noted that Dr. Templin's March 27, 2007, report stated that 8% of Good's impairment to the whole person was attributable to the work injury of May 23, 2003. The ALJ stated that he used that part of Dr. Templin's report as grounds for his findings in the opinion and order.

Additionally, the ALJ found that Good's 2003 injury would not have been independently totally disabling, but it "aroused from [Good's] previous condition as a result of his 2001 injury to render him totally disabled."

Sigmon Coal, as insured by KEMI, appealed to the Workers' Compensation Board (Board). The employer argued that the ALJ erred in assigning KEMI liability for excess disability benefits attributable to the 2001 injury. It also asserted that the ALJ erred when he calculated Good's weekly benefit, arguing that the ALJ should have calculated "the liability of each [insurer] separately, based on the functional impairment rating attributable to each accident and resulting injury." The employer contended that KEMI's liability should have been "limited to that of a DRE Category II 5-8% AMA whole person impairment which by the ALJ's explicit finding of December 7, 2007, would not have been totally disabling." It also argued that "KEMI's compensable period cannot be extended beyond 425 weeks."

The Board affirmed the ALJ's decision, concluding that the ALJ's decision holding the employer liable for the excess disability was in accord with the Board's prior decisions with similar fact patterns. The Board also found that substantial evidence supported the ALJ's finding concerning the apportionment of impairment; specifically, that Good was impaired "25% due to the 2001 injury when American Mining was at risk and 8% due to the 2003 injury when KEMI was at risk." Therefore, the Board held that "the facts in the record [were] clear and not internally inconsistent and no further findings of fact on the issue [were] required as argued by KEMI."

Sigmon Coal, as insured by KEMI, now petitions this court for review. In its petition, the employer argues that it should not be liable for the excess disability concerning the 2001 injury. The employer also asserts that the Board erred

> in calculating Good's weekly benefit by taking the gross weekly rate for a total disability, then subtracting the weekly rate for the liability of American Mining for a permanent disability rating based on 25% whole person impairment with the 'double multiplier' found in K.R.S. 342.730(1)(c)(2); and assigning KEMI liability for the difference.

The employer, as insured by KEMI, further contends that it "is only liable for benefits based on the 8% functional impairment rating attributable to its accident and resulting injury, [and that] KEMI's compensable period cannot be extended beyond 425 weeks."

II. STANDARD OF REVIEW

When we review a decision of the Workers' Compensation Board, we "correct the Board only when we perceive that the Board has overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Daniel v. Armco Steel Co., L.P.*, 913 S.W.2d 797, 798 (Ky. App. 1995). In reviewing the Board's decision, we must ultimately review the ALJ's decision. The ALJ is the fact-finder, and "[w]hen the decision of the fact-finder favors the person with the burden of proof, his only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to reasonably find as it did." *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

III. ANALYSIS

We first note that, in its petition for review, the employer no longer challenges the ALJ's finding that there is an "8% functional impairment rating attributable to [the 2003] accident and resulting injury." Thus, the employer's prior claim that there was only a 5% impairment rating attributable to that injury is deemed waived. *See Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 815 (Ky. 2004).

The employer, as insured by KEMI, argues that it should not be liable for the excess disability concerning the 2001 injury, because KEMI was the employer's insurance carrier during the time of the 2003 injury. This Court has previously upheld a decision of the Board in another case, wherein the Board held that the employer at the time the claimant was rendered totally disabled was liable

for the excess disability benefits involving a prior injury. In so holding, the Court quoted the Board's opinion, which provided that:

> [C]laimants who are rendered totally disabled by a series of work injuries with different overlapping awards are to receive benefits that correspond to the whole of their disability on the date that disability begins. . . . However, where a subsequent injury occurs and the worker is determined to be totally and permanently disabled, the amount and duration of an award for a prior condition may not be extended beyond that allowed under the Act for permanent partial disability if the first injury is combined with the subsequent injury to find total disability. . . . After the expiration of any overlapping period of permanent partial disability, the original overlapping dollar amount becomes excess disability and becomes the liability of the workers' compensation insurance carrier legally responsible for the final injury for so long as the claimant is disabled.

Sears Roebuck & Co. v. Dennis, 131 S.W.3d 351, 354-55 (Ky. App. 2004) (internal quotation marks omitted and emphasis removed). In the *Dennis* case, the claimant first injured himself while working at Radio Shack, and subsequently injured himself while working at Sears. The *Dennis* claimant was eligible for permanent partial disability benefits concerning his prior Radio Shack injury, but in the present case, the ALJ determined that Good was eligible for temporary total disability benefits concerning his prior injury. Regardless, in *Dennis*,

> the ALJ found that Dennis was totally occupationally disabled as a result of the combined effects of an increase in his prior back impairment [from his Radio Shack injury] *and* the psychological condition caused at Sears. . . . Under these circumstances, the law dictates that the liability for total occupational disability benefits rests upon Sears – the employer at risk at the time of the last injury.

Dennis, 131 S.W.3d at 355 (citation omitted). Furthermore, the Court in *Dennis* held that "there is no statutory prohibition for splitting the award of medicals among the claimant's various employers." *Id*. at 356.

The Board in the present case cited the *Dennis* case in support of its decision that KEMI, as the employer's insurer at the time of Good's last injury in 2003, was liable for the excess disability that existed for the 2001 injury. Based on the reasoning in *Dennis*, we find that the Board did not err in this finding.

Additionally, because the Board properly followed the reasoning in *Dennis*, KEMI's argument that it should only be liable for benefits based on the "8% functional impairment rating attributable to its accident and resulting injury, [and that] KEMI's compensable period cannot be extended beyond 425 weeks," lacks merit. The Court in *Dennis* noted that after the period of overlapping disability payments had expired, "the original overlapping dollar amount becomes excess disability and becomes the liability of the workers' compensation insurance carrier legally responsible for the final injury for so long as the claimant is disabled." *Dennis*, 131 S.W.3d at 354-55. Therefore, KEMI's argument lacks merit.

> The employer also asserts that the Board erred in calculating Good's weekly benefit by taking the gross weekly rate for a total disability, then subtracting the weekly rate for the liability of American Mining for a permanent disability rating based on 25% whole person impairment with the 'double multiplier' found in K.R.S. 342.730(1)(c)(2); and assigning KEMI liability for the difference.

However, the employer acknowledges that there is no law to support this contention. Accordingly, we cannot say that "the Board has overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Daniel*, 913 S.W.2d at 798. Thus, the Board did not err in so holding.

Accordingly, we affirm the decision of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Barry Lewis
Hazard, Kentucky

BRIEF FOR APPELLEE:

Katherine M. Banks
Prestonsburg, Kentucky

NO BRIEF FOR APPELLEE
TOMMY GOOD