

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky

2002-SC-0450-WC

FINAL
DATE 5-22-03 11:17 AM C. Grew, H.D.C.

VICKI MOSLEY

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2001-CA-2555-WC
WORKERS' COMPENSATION BOARD NO. 99-57160

BWI BOOK WHOLESALER A/K/A FOLLETT
LIBRARY BOOKSTORE; HON. J. LANDON OVERFIELD,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Affirming a decision by the Workers' Compensation Board (Board), the Court of Appeals has determined that the claimant's award was properly limited under KRS 342.730(1)(b), (c), and (d) to 99% of 66 $\frac{2}{3}$ % of her average weekly wage, the maximum benefit for permanent, partial disability. The Court also determined that because she was awarded the maximum benefit for her disability, a question concerning whether the 4th or 5th edition of the AMA's Guides to the Evaluation of Permanent Impairment (Guides) governed the claim would not affect the amount to which she was entitled and, therefore, was moot. We affirm.

It is undisputed that the claimant sustained a work-related injury due to carpal tunnel syndrome on February 1, 1999, and that she does not retain the physical capacity to return to the type of work that she performed when injured. The medical

proof concerning the extent of her functional impairment was taken in late 2000 and early 2001, at which time the 5th edition of the Guides had been published but was not yet widely available. The Commissioner of the Department of Workers' Claims did not certify that the 5th edition was generally available for use and, therefore, the "latest available edition" until March 1, 2001. 803 KAR 25:010E, Section 1(9).

All of the physicians who rated the claimant's impairment from carpal tunnel syndrome did so under the 4th edition of the Guides. Drs. O'Neil and Owen testified to a 34% impairment from carpal tunnel syndrome on the claimant's behalf, and Dr. Hodes testified to a 31% impairment on the employer's behalf. On February 23, 2001, Dr. Hodes reevaluated the claimant at the employer's request, and he assigned a 21% impairment using the 5th edition of the Guides. Suspecting that the 5th-edition rating included only one arm, the claimant deposed Dr. Hodes on April 3, 2001, at which point he revised it to 41% for both arms, 10% higher than his 4th-edition rating. Thus, a question arose concerning which edition of the Guides controlled the claim.

Concluding that the latest edition as of the date of injury controlled, the ALJ determined that the claimant's impairment rating was 34%. Furthermore, because she lacked the physical capacity to perform her previous work, the ALJ determined that she was entitled to an enhanced income benefit under KRS 342.730(1)(c)1 of up to 100% of the state's average weekly wage. Both parties petitioned for reconsideration. The claimant's petition was granted to the extent that her average weekly wage was amended and her enhanced benefit recalculated. The employer's petition was granted to the extent that the enhanced benefit was limited to 99% of 66% of the claimant's average weekly wage.

Appealing, the claimant maintained that she was entitled to an enhanced benefit of up to 100% of the state's average weekly wage and that her impairment rating should have been determined under the 5th edition of the Guides. Nonetheless, the Board affirmed, concluding that the ALJ had properly applied KRS 342.730(1)(b), (c), and (d) as construed in Stewart v. Kiah Creek Mining Co., Ky., 42 S.W.3d 614 (2001). Furthermore, noting that the claimant had received the maximum benefit to which she was entitled for permanent partial disability, the Board determined that although the ALJ was not required to use the 4th edition of the Guides, the error was harmless under the circumstances. The Court of Appeals subsequently affirmed on the first issue and declined to address the second issue, noting that it was moot.

In Stewart v. Kiah Creek Mining Co., *supra*, we noted that applying the 1.5 multiplier set forth in KRS 342.730(1)(c)1 had the potential to result in a partial disability benefit that exceeded the statutory maximum for total disability. We determined, however, that the plain language of KRS 342.730(1)(d) imposed two limits on the amount of a partial disability benefit. It may not exceed 99% of 66 $\frac{2}{3}$ % of the worker's average weekly wage. Furthermore, it may not exceed 75% of the state's average weekly wage unless KRS 342.730(1)(c)1 applies, in which case the benefit may not exceed 100% of the state's average weekly wage. *Id.* at 617-18. Contrary to the claimant's argument, our interpretation of KRS 342.730(1)(d) in Stewart applies to all partial disability awards. Lest there be any doubt, a partial disability award that is enhanced under KRS 342.730(1)(c)1 may not exceed either 99% of 66 $\frac{2}{3}$ % of the worker's average weekly wage or 100% of the state's average weekly wage. *Id.* at 618.

The ALJ calculated the claimant's benefit using a 4th-edition impairment rating and, applying KRS 342.730(1)(d), limited it to 99% of 66 $\frac{2}{3}$ % of her average weekly

wage. Even if Chapter 342 were to require the use of a 5th-edition impairment and result in a greater potential award, the claimant's actual benefit could not be any greater than she has already been awarded. For that reason, it is unnecessary for us to reach the second question that she raises, and we will refrain from doing so.

The decision of the Court of Appeals is affirmed.

All concur.

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