

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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-0594-WC

FINAL

DATE 5/22/03 AG STW HJ DC

KELVIN CORPORATION

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2002-CA-0041-WC
WORKERS' COMPENSATION BOARD NO. 99-63614

RUBEN VEGA; HON. IRENE STEEN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that, having settled his claim for a lump sum that represented a 14% impairment and a post-injury wage in excess of his wage at the time of injury, the claimant could not reopen when his wage became less than at the time of injury. In a decision that was later affirmed by a majority of the Court of Appeals, the Workers' Compensation Board (Board) reversed and remanded for further proceedings. Appealing, the employer maintains that its entire liability for a 14% impairment was extinguished by payment of the lump sum and that although the claimant did not expressly waive the right to reopen in order to conform the award to KRS 342.730(1)(c)2, the lump-sum settlement effectively precluded such a reopening.

The claimant suffered a crush injury to his right thumb in September, 1999, while working for the defendant-employer. After a hospital stay and surgery, his physician

assigned a 14% impairment rating. The employer paid 14 weeks of temporary total disability (TTD) benefits as well as medical benefits, and the claimant returned to his former job in January, 2000, receiving a weekly wage that exceeded his wage at the time of the injury. The parties later agreed to settle the claim for permanent partial disability, and the agreement was approved on August 15, 2000. As approved, it provided for an additional \$300.02 in TTD benefits and for \$8,470.19 in permanent partial disability benefits, the calculation of which was based upon the claimant's wage on the date of injury, a 14% impairment, a factor of 1.25, and a 50% reduction under KRS 342.730(1)(c)2. The agreement specified that it did not include a waiver or buyout of future medical expenses but made no reference to the right to reopen.

On December 6, 2000, the claimant moved to reopen the award, alleging that he was entitled to the full benefit for a 14% disability. Accompanying the motion was his affidavit that he had been terminated by the defendant-employer and presently was earning no income. Also attached to the motion was a copy of a letter from his attorney to the carrier's claims adjuster demanding an additional \$8,470.19 in partial disability benefits. The employer asserted that the claimant "simply clocked out on October 20, 2000 and never returned to work." It objected to reopening on the ground that the motion alleged no increased disability or impairment and maintained that the lump-sum payment fully extinguished its liability for income benefits for a 14% impairment. Finally, the employer pointed out that KRS 342.730(1)(c)2 did not contemplate a weekly review of an injured worker's earnings but a comparison of pre- and post-injury average weekly wage as calculated under KRS 342.140. Ball v. Big Elk Creek Coal Co., Inc., Ky., 25 S.W.3d 115 (2000). The motion was granted.

At reopening, the claimant testified that he presently worked for a different

employer and earned \$8.40 per hour; whereas he had earned \$10.00 per hour at the time of the injury and \$11.00 at the time of the settlement. He pointed out that the applicable version of KRS 342.730(1)(c)2 provided for the restoration of full benefits during any period when an injured worker no longer was employed at a wage that equaled or exceeded the wage at the time of injury, and he also pointed out that both KRS 342.730(1)(c)3 and KRS 342.125(3) permitted reopening at any time to conform an award to KRS 342.730(1)(c)2. He maintained, therefore, that because the agreement contained no waiver of his right to reopen, he was permitted to reopen the award and was entitled to receive an additional lump sum for the full income benefit for a 14% disability. The ALJ determined, however, that to permit a reopening on these facts would discourage employers from settling claims and dismissed the matter. Whereupon, the claimant appealed.

Reversing the decision, the Board emphasized that KRS 342.730(1)(c)2 and 3 clearly applied because the claimant's present average weekly wage was less than his pre-injury wage. Under such circumstances, KRS 342.730(1)(c)3 permitted reopening "at any time," and no contractual language in the settlement agreement precluded such a reopening. Furthermore, KRS 342.125(3) specifically exempted a reopening in order to conform an award to KRS 342.730(1)(c)2 from the statutes of limitation and repose. KRS 342.125(7) provided, however, that no statement contained in the agreement shall be considered to be an admission against the interests of any party at reopening and that any issue that could have been raised in the initial proceeding may be raised at reopening. Finally, the Board rejected the employer's argument that the references in KRS 342.730(1)(c)2 and 3 to "weekly benefits" and "award payments" were inapplicable because a lump sum was paid, pointing out that the lump sum represented

the present value of the weekly benefits that would otherwise have been paid. It concluded that the claimant was entitled to full weekly benefits during the period that he was unemployed and for so long thereafter as his average weekly wage continued to be less than his wage at the time of injury. Furthermore, noting the Court's explanation in Ball v. Big Elk Creek Coal Co., Inc., *supra*, that the ALJ should not focus on a particular week but on the worker's earning capacity in the post-injury employment, the Board determined that the ALJ should compute the claimant's earnings over a period of 13 consecutive calendar weeks and that the ALJ was permitted to utilize KRS 342.140(1)(e) if the employment was of insufficient duration to apply subsection (1)(d). The Court of Appeals affirmed the decision, and the employer appeals.

An agreement to settle a workers' compensation claim is a contract between the parties. As such, it is subject to the rules of contractual interpretation, the goal of which is to effectuate the intent of the parties. The settlement of workers' compensation claims is favored, and KRS 342.265 provides that an approved agreement shall be treated as a final award that is subject to enforcement in circuit court under KRS 342.305.

KRS 342.730 provides for the weekly payment of income benefits. Although KRS 342.265(2) specifies that agreements providing for the lump-sum payment of future income benefits that would otherwise exceed \$10.00 per week require a reasonable assurance that the worker will have an adequate source of income during disability, we are aware of no authority that would require an ALJ to treat an agreement providing for lump-sum payment differently at reopening than one providing for periodic payment. Furthermore, the employer has cited none. In either event, payment of the amount that the parties agreed upon would extinguish the employer's liability for

whatever occupational disability actually existed at the time of the settlement, regardless of the figure for which the parties settled. See Newberg v. Davis, Ky., 841 S.W.2d 164, 166 (1992); Newberg v. Chumley, Ky., 824 S.W.2d 413, 416 (1992).

As we pointed out in Adkins v. R & S Body Company, Ky., 58 S.W.3d 428, 431-32 (2001), since December 12, 1996, income benefits for partial disability continue to be awarded on the basis of occupational disability, but a worker's entitlement is no longer determined under the Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968), standard. Instead, it is based upon the individual's AMA impairment, a statutory factor that is weighted to favor more severe impairments, and the worker's post-injury earnings. In Adkins, we concluded that although the 1996 formula for calculating income benefits might imperfectly compensate an individual worker's loss, it was neither arbitrary nor unconstitutional.

Although final workers' compensation awards are subject to the principles of the finality of judgments, the 1996 Act permits the reopening of an award and the entry of a new award that increases or decreases benefits under certain specified circumstances. At the reopening of a settled award, any increase or decrease in benefits is based upon a change in the worker's actual occupational disability, regardless of the figure for which the parties settled. See Newberg v. Davis, *supra*. KRS 342.125(1)(d) authorizes a reopening for a change of disability as shown by objective medical evidence of a worsening or improvement of impairment, and KRS 342.125(3) provides an exemption from the periods of limitation a repose when a change of average weekly wage causes an award to be in nonconformance with KRS 342.730(1)(c)2. Furthermore, KRS 342.730(1)(c)3 provides for a reopening "at any time" should the second situation occur. It is apparent, therefore, that KRS 342.125 and KRS 342.730 recognize that

both a change in disability and a change in post-injury earnings are grounds for reopening a final award.

In Hall v. Big Elk Creek Coal Co., *supra*, we determined that KRS 342.730(1)(c) 2 and 3 did not contemplate an adjustment in benefits for weekly fluctuations in the worker's post-injury earnings but contemplated an increase or reduction in income benefits based upon changes in the individual's average weekly wage. In reaching this conclusion, we noted that limiting the amount of income benefits to an individual who had sustained no present loss of income was consistent with the purpose of the benefit. Furthermore, we noted that the method the legislature had chosen to determine a worker's earning capacity in a particular employment was the average weekly wage. We pointed out that, rather than focusing upon a particular week that might or might not accurately reflect the individual's earning capacity, KRS 342.140 based the calculation upon a period of 13 consecutive calendar weeks. In instances where the duration of the employment is less than 13 weeks, KRS 342.140(1)(e) provides an alternative method.

Here, the claimant agreed to settle his claim for a lump sum that was based upon a 14% impairment and reduced by 50% because his post-injury wage exceeded his wage at the time of injury. The agreement indicated that it did not include a waiver or buyout of future medical expenses but made no reference whatsoever to reopening, and there is nothing in the agreement to reasonably indicate that the parties contracted for a waiver of the claimant's right to reopen if his earning capacity were to become less than at the time of the injury. Therefore, although his receipt of the lump sum extinguished the employer's liability for an income benefit that was based upon a 14% impairment and a post-injury wage that equaled or exceeded the wage at the time of

injury, it did not extinguish his right to reopen if his impairment increased or if his average weekly wage became less than at the time of injury. Under those circumstances, the ALJ erred by dismissing the reopened claim.

Unlike the ALJ and the dissent at the Court of Appeals, we are not convinced that this decision defeats an employer's purpose in entering into a settlement. It simply emphasizes the contractual nature of such an agreement and the risk that each party to an agreement bears. The fact remains that nothing prevented this employer from contracting for a waiver of the claimant's right to reopen if his post-injury average weekly wage were to become less than it had been at the time of injury. Having failed to do so, it has no basis to complain.

The decision of the Court of Appeals is affirmed.

All concur.

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