

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: September 18, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2002-SC-0841-WC **DATE** 10-9-03 ELLAGrowitt, D.C.

SIDNEY COAL COMPANY

APPELLANT

V. APPEAL FROM COURT OF APPEALS
2002-CA-0968-WC
WORKERS' COMPENSATION BOARD NO. 00-85213

CHARLES FINLEY; HON. DONALD G.
SMITH, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Despite the claimant's testimony that he quit working due to prior back injuries, an Administrative Law Judge (ALJ) determined that his leg injury was a reason that he lacked the physical capacity to return to his previous employment and enhanced his income benefits under KRS 342.730(1)(c)1. Although the employer maintained that the decision to enhance the claimant's award was not supported by the evidence, the Board and the Court of Appeals affirmed. Finding no error in the decision, we affirm.

The claimant was employed in the coal mining industry. He was a certified mine foreman and was employed by the defendant-employer in August, 1999, to operate a roof bolter. Later, he worked as a section foreman. On September 15, 1999, he injured his back while moving a miner cable. He missed approximately two weeks of work before returning to his regular duties. On April 3, 2000, he re-injured his back

while lifting a roof bolt, and his employer placed him on light duty until April 25, 2000, at which time he was taken off work altogether. He received temporary total disability (TTD) benefits from April 25 through June 18, 2000, when his physician released him to return to work without restrictions. On September 14, 2000, he fractured his left distal tibia while working and received TTD benefits from September 14, 2000, through January 3, 2001.

In April, 2001, the claimant returned to work with a different mining company but was laid off shortly thereafter and received unemployment benefits. He later testified that although the company called him back to work, he declined the offer due to the effects of his injuries. He indicated that he had not returned to work since the layoff and had applied for social security disability as well as workers' compensation benefits.

As amended during litigation, the claimant's application for benefits included the 1999 and 2000 back and leg injuries. After determining that the claimant was not totally disabled, the ALJ relied upon Dr. Rapier's testimony and awarded permanent partial disability benefits based upon a 5% impairment to the back and a 4% impairment to the leg. Both awards were enhanced under KRS 342.730(1)(c)1 on the basis of findings that the claimant did not retain the physical capacity to return to his previous work.

The employer petitioned for reconsideration, maintaining that the award for the leg injury should not have been enhanced. The employer also requested findings of fact and conclusions of law concerning the applicability of KRS 342.730(1)(c)2, which would have reduced the award for the 2000 back injury during the period from June 18, 2000, through September 18, 2000, when the claimant worked and received his full wage. The petition was overruled. Relying upon Dr. Rapier, the ALJ inferred that the physician attributed the claimant's present condition to the effects of both the leg and

back injuries. Although the decision indicated that the multipliers used in the award were correct, it did not address the applicability of KRS 342.730(1)(c)2.

Appealing to the Board, the employer again raised the questions that it had raised in its petition for reconsideration. Although the Board reversed and remanded with directions to address the applicability of KRS 342.730(1)(c)2, it affirmed the decision to enhance the award for the leg injury. The Court of Appeals affirmed, and this appeal by the employer followed.

Only the application of KRS 342.730(1)(c)1 to the award for the leg injury remains at issue. The version in effect at the time of the injury provides as follows:

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 employer points to the claimant's testimony that he quit working due to the effects of his back injury and his failure to mention the leg injury as a cause of his decision to do so. On that basis, the employer maintains that because the leg injury did not contribute to his decision to quit working, the award for the injury should not have been enhanced.

Just as a worker's testimony concerning the cause of his inability to continue working will not compel a decision in his favor, it will not compel a decision to the contrary in the face of persuasive medical evidence. See Grider Hill Dock v. Sloan, Ky., 448 S.W.2d 373 (1969). Dr. Rapier assigned a 4% impairment to the leg injury and reported evidence of atrophy in the left calf and thigh. He indicated an awareness of the physical requirements of the claimant's work and indicated that, due to his medical

conditions, he no longer retained the physical capacity to return to the work that he performed when he was injured. Under those circumstances, substantial evidence supported the decision to apply the multiplier found in KRS 342.730(1)(c)1 to the award for the leg injury.

The decision of the Court of Appeals is affirmed.

All concur.

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