

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: May 19, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2004-SC-0524-WC

DATE 6-9-05 Ellington, J.C.

AUDUBON METALS, LLC

APPELLANT

V. APPEAL FROM COURT OF APPEALS
2003-CA-2435-WC
WORKERS' COMPENSATION BOARD NO. 00-65407

BERNARD THOMAS, JR.; HON. DONALD G.
SMITH, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Workers' Compensation Board (Board) determined that the Administrative Law Judge (ALJ) erred as a matter of law by failing to start the claimant's permanent partial disability award upon his return to work after from his injury rather than his return from a second period of temporary total disability (TTD). Rejecting an argument that the Board usurped the ALJ's authority regarding a question of fact, the Court of Appeals affirmed. We affirm.

The claimant was born in March, 1941. He had a history of manual labor and worked for the defendant-employer as a maintenance mechanic. On October 15, 2000, a hydraulic tool that he was using to separate two parts of a machine became dislodged and struck him in the face. Taken by ambulance to the hospital, he underwent surgery that day and was dismissed the next. Emergency room and hospital records from Dr. Logan indicated that the claimant sustained a very marked septal fracture, multiple

facial lacerations, damaged teeth, and intraoral lacerations as well as lacerations of the upper lip. Records from the following weeks noted complaints of pain in the head as well as the right neck and shoulder. The claimant stated that he returned to “real light-duty” work after Christmas, 2000, but did not remember for how long he remained on light duty.

The employer submitted a January 29, 2001, report from Dr. O’Neill, which indicated that the claimant sustained a cervical sprain or strain. It stated that he had reached maximum medical improvement (MMI) and had returned to work, that he was released to perform full duty work, and that no permanent “disability” was anticipated.

On April 19, 2001, Dr. Shah performed a neurological examination at Dr. Logan’s request regarding the claimant’s ongoing neck and shoulder pain as well as pain in the occipital area. He diagnosed a whiplash or hyperextension injury to the cervical muscles and ligaments. Noting that there was probably some component of occipital neuralgia on the right side, Dr. Shah recommended an occipital nerve block. Like Dr. O’Neill, he thought the claimant could perform his current job at full duty and without restrictions.

Dr. Covington evaluated the claimant on November 26, 2002. He noted that the claimant continued to have facial discomfort and neck discomfort that radiated into the head despite pain management therapy. Dr. Covington diagnosed trigeminal nerve disorder, occipital neuralgia, neck pain, and myofascial pain disorder of the neck and shoulder for which he assigned a combined impairment of 36%. His report did not state when MMI occurred.

Dr. Gleis evaluated the claimant for the employer on February 27, 2003. He diagnosed facial laceration with fractures secondary to the work injury, right trigeminal

nerve injury, cervical strain with pain referred to the right trapezius but no intrinsic right shoulder injury. He also noted that the injury to the claimant's teeth had required that they all be removed. Dr. Gleis assigned a combined impairment of 21%, noting that a dental impairment was not included. His report did not state when MMI occurred.

The claimant testified that he recovered and returned to light-duty work on December 26, 2000. He later missed work from September 12 – 18, 2002, for oral surgery to extract teeth that were damaged by injury. He stated that every day since his injury he had experienced a burning sensation on the right side of his face, through his eye and ear, through his neck, and into his right front shoulder. When his claim was heard, he remained under medical treatment but was performing his regular job with the assistance of a co-worker and at a greater wage than when he was injured.

The disputed issues included the extent and duration of disability, the date for terminating an award under KRS 342.730(4), and proper TTD benefits. Among other things, the employer asserted that a partial disability award should not commence until late 2002 or early 2003, explaining that Dr. O'Neil anticipated no permanent disability in January, 2001, and that there was no evidence the claimant had a compensable disability until he received AMA impairment ratings from Drs. Covington and Gleis. Asserting that he was disabled from the outset, the claimant maintained that he was entitled to permanent income benefits as of his return to work on December 26, 2000.

Finding Dr. Covington to be the most persuasive medical witness, the ALJ determined that the claimant's impairment was 36% and the applicable statutory factor was 1.70. The claimant received a TTD award from October 17, 2000, through December 25, 2000, and a second period of TTD from September 12, 2002 through September 18, 2002. That was followed by a 425-week award of permanent partial

disability benefits that would terminate when the claimant qualified for old-age social security benefits. The decision contained no rationale for starting permanent income benefits on September 19, 2002.

In a petition for reconsideration, the claimant requested that his permanent award be started following the initial period of TTD, suspended during the second period of TTD, and resumed thereafter. Responding to the petition, the employer maintained that it only reargued the merits and should be denied. Following a summary order that denied his petition, the claimant appealed.

Workers' compensation is statutory. KRS 342.0011(11) defines the relevant disabilities as follows:

(a) "Temporary total disability" means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment;

(b) "Permanent partial disability" means the condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work[.]

As defined in KRS 342.0011(35), the term "permanent impairment rating" refers to an impairment determined under the AMA guidelines. According to KRS 342.0011(36), a "permanent disability rating" is the product of the AMA impairment the ALJ selects and the corresponding factor from the table found in KRS 342.730(1)(b). Based on the 36% impairment the ALJ selected and a factor of 1.70, the claimant's permanent disability rating is 61.2.

Income benefits for an injury are determined under KRS 342.730, which provides in pertinent part as follows:

(1) Except as provided in KRS 342.732, income benefits for disability shall be paid to the employee as follows:

....

(b) For permanent partial disability, sixty-six and two-thirds percent (66- 2/3%) of the employee's average weekly wage but not more than seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740, multiplied by the permanent impairment rating caused by the injury . . . times the factor set forth in the table that follows Any temporary total disability period within the maximum period for permanent, partial disability benefits shall extend the maximum period[.] (emphasis added).

....

(d) For permanent partial disability, if an employee has a permanent disability rating of fifty percent (50%) or less as a result of a work- related injury, the compensable permanent partial disability period shall be four hundred twenty-five (425) weeks, and if the permanent disability rating is greater than fifty percent (50%), the compensable permanent partial disability period shall be five hundred twenty (520) weeks from the date the impairment or disability exceeding fifty percent (50%) arises. (emphasis added).

Finally, KRS 342.285 provides that an ALJ's decision "shall be conclusive and binding as to all questions of fact," but among the grounds for reversal are that the decision "is not in conformity to the provisions of [Chapter 342]," that it is "clearly erroneous" under the evidence, or that it is "arbitrary and capricious."

Noting that the purpose of income benefits is to provide a stream of income to meet the essential needs of disabled workers and their dependents, the employer asserts that the purpose of the benefit would not be fulfilled between the claimant's two periods of TTD because he returned to his regular job at his regular pay. Of course, the same rationale would support the award of no permanent income benefit at all because the claimant again returned to his regular work on September 19, 2002. Yet, KRS 342.730(1)(b) and (c) clearly provide that individuals who return to their usual work at the same or greater pay may receive income benefits for permanent partial disability.

The employer also argues that a worker does not have a partial disability under KRS 342.0011(11)(b) until an AMA impairment is assigned. It asserts that the decision to begin permanent income benefits on September 19, 2002, should not have been reversed because the date is “most consistent with the fact that the plaintiff’s permanent impairment was not known until November, 2002, approximately two months later.” Yet, it fails to state a legal rationale for commencing permanent income benefits on the date when a worker is evaluated for the purpose of determining an AMA impairment rather than on the date when an impairment that later warranted an AMA rating came into existence.

Under KRS 342.730(1)(d), the compensable period for a permanent disability rating greater than 50% is 520 weeks from the date the “impairment or disability . . . arises.” Under KRS 342.730(1)(b), it is suspended for any intervening period that the worker receives TTD. “Impairment” refers to the “damage,” “imperfection,” or “functional defect” the injury causes. See Merriam-Webster’s Collegiate Dictionary 622 (11th ed. 2004). Although the method for measuring the extent of partial disability changed on December 12, 1996, and now is based on a permanent impairment rating as determined under the AMA guidelines, KRS 342.730 continues to award income benefits on the basis of disability, i.e., a loss of the ability to perform work. Adkins v. R & S Body Co., 58 S.W.3d 428 (Ky. 2001). In other words, an injury that causes a permanent impairment also causes a permanent disability.

The date for commencing permanent benefits is determined with hindsight, based on what has happened when the claim is heard rather than what was known immediately after the injury. In some instances, harmful changes from an injury are latent, and a permanent impairment or disability may not arise for some time. Then,

permanent income benefits are properly begun sometime after the date of injury, when the permanent impairment or disability does arise. As the Board and the Court of Appeals pointed out, however, most often the of period permanent partial disability will immediately follow a post-injury period of TTD or the injury, itself. This occurs because usually an injury causes harmful changes that are immediate and, to some extent, permanent. Hence, permanent impairment and disability arise immediately even though their amount cannot be measured until the worker reaches MMI.

The ALJ provided no rationale for beginning the claimant's permanent income benefits after his second period of TTD, and we are aware of none that is supported by the evidence. It was obvious from the medical evidence that the harmful changes from the claimant's injury were not latent and that permanent impairment was present from the outset. Under the circumstances, KRS 342.730(1)(b) and (d) entitled him to receive permanent income benefits from the outset, based on the amount of his impairment that was permanent, and with the period for which they were payable extended by the intervening periods of TTD. In other words, a proper partial disability award would have been payable for 520 weeks from the date of injury; suspended during the initial period of TTD which began with the injury and ended with his return to work on December 26, 2000; suspended again during the second period of TTD in September, 2001; and terminated altogether when he qualified for normal old-age social security benefits. To the extent that the claimant's award was inconsistent with Chapter 342, it was erroneous as a matter of law and properly reversed on appeal.

The decision of the Court of Appeals is affirmed

All concur.

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