

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: August 25, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2004-SC-0992-WC

DATE 9-15-05 E.A.G. G.W.H.D.C.

EARL HARRIS

APPELLANT

V. APPEAL FROM COURT OF APPEALS
2004-CA-0154-WC
WORKERS' COMPENSATION BOARD NO. 96-68717

STEVENS DISPOSAL; HON. DONNA H. TERRY,
ADMINISTRATIVE LAW JUDGE; WORKERS'
COMPENSATION BOARD; AND WORKERS'
COMPENSATION FUNDS

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Relying on KRS 342.125(4), an Administrative Law Judge (ALJ) determined that although the claimant underwent post-settlement knee replacement surgery on September 13, 2002, he was not entitled to temporary total disability (TTD) benefits until the date of his motion to reopen, which was November 8, 2002. The Workers' Compensation Board and the Court of Appeals affirmed. Appealing, the claimant asserts that post-award TTD benefits do not change or increase the amount of compensation previously awarded, that his entitlement arose when he met the criteria of KRS 342.0011(11)(a), and that requiring a worker to file a prospective motion to reopen for TTD benefits circumvents KRS 342.040 and KRS 304.12-230, the Unfair Claims Settlement Practices Act. We affirm.

The claimant injured his right knee while working in August, 1996. On December 1, 1998, he filed an application for benefits in which he alleged both the knee injury and a subsequent back injury that occurred when the injured knee gave out. The application stated that he had undergone knee surgery and that surgery for a herniated disk was proposed. A settlement agreement approved on October 6, 2000, indicated that the claimant had undergone multiple arthroscopic knee surgeries as well as lower back surgery. It also indicated that the employer had paid \$40,005.69 in medical benefits and \$24,548.33 (128 1/7 weeks) in TTD benefits to date. The agreement provided for \$5,000.00 in additional TTD benefits as well as for lump sum payments by the employer and Special Fund that represented a 45% permanent partial disability. It did not compromise the claimant's right to future medical expenses and to reopen.

On September 13, 2002, the claimant underwent total right knee replacement surgery. He submitted the medical bills to his health insurance carrier, but on November 8, 2002, he moved to reopen his workers' compensation claim, alleging a worsening of condition. The employer objected to the motion, maintaining that the worsening of condition was not attributable to the work-related injury. The issues presented to the ALJ included, among other things, the claimant's entitlement to TTD benefits from September 13, 2002, until he reached maximum medical improvement (MMI) following the knee surgery; the date of MMI; the compensability of the surgery; and his entitlement to income benefits for a permanent increase in disability due to the knee condition.

After considering the lay and medical evidence at reopening, the ALJ determined that the claimant's knee condition was due to the work-related injury, that his actual occupational disability at settlement had been 75%, and that his present occupational

disability was no greater. Relying on Dr. Dobner's testimony, the ALJ determined that the claimant did not reach MMI until one year after the knee replacement surgery. The claimant received an award of medical benefits for the knee condition and TTD benefits "commencing on November 8, 2002, the date of the motion to reopen, and continuing until one year post-surgery, or September 13, 2003." In a petition for reconsideration, he requested that TTD benefits be instituted on the date of surgery. It was denied.

The claimant asserts that the ALJ misinterpreted KRS 342.125(4) by failing to consider KRS 342.040 and erred by commencing his award from the date of his motion to reopen rather than the date that he came within the definition of TTD. He notes that the settlement did not compromise his right to future TTD or medical benefits and that the ALJ found him to be temporarily totally disabled for a year following his surgery. He also notes that KRS 342.040(1) provides for income benefits from the onset of a disability lasting more than two weeks. It requires the employer to institute benefits no later than 15 days after its knowledge of the disability or to inform the Department of Workers' Claims of its refusal to do so. Furthermore, KRS 342.040(2) penalizes an employer who denies or delays paying TTD "without reasonable foundation." Nonetheless, the ALJ refused to award benefits that conformed to KRS 342.040 simply because the period of TTD arose after the initial award.

The claimant maintains that KRS 342.125(4) is inapplicable to post-award TTD and medical benefits. He argues that post-award TTD does not change the amount of compensation ordered because future TTD benefits "were never contemplated and were not part of the compensation of the prior settlement." He also argues that because KRS 342.730(1)(b) tolls the period of permanent partial disability for any intervening period of TTD, a post-award period of TTD would not change the amount of

compensation previously awarded because it would not change the amount of permanent partial disability benefits. Asserting that the legislature intended for TTD to be treated differently from permanent income benefits at reopening, he notes that KRS 342.125(3) limits the time within which a worker may reopen a partial disability award up to four years from the date of the original award but that it expressly permits a reopening to obtain TTD benefits at any time during the period of the award. Yet, under the ALJ, Board, and Court of Appeals decisions, an injured worker would lose valuable benefits while waiting for a medical report to establish a worsening of condition.

The employer argues that both KRS 342.040(1) and KRS 342.125(4) apply to TTD and permanent partial disability benefits. KRS 342.125(4) requires that a change in the amount of compensation for permanent partial disability or TTD that is set forth in an award to be prospective, from the date of the motion to reopen. The employer argues that if the claimant had filed a properly supported motion to reopen seeking advance approval for the surgery and requesting TTD during his recovery, TTD would have been payable from its onset.

As amended effective December 12, 1996, KRS 342.125(4) states, in pertinent part, as follows:

Reopening shall not affect the previous order or award as to any sums already paid thereunder, and any change in the amount of compensation shall be ordered only from the date of filing the motion to reopen.

The amendment codified longstanding judicial decisions that any changes in the amount of benefits must be prospective, from the date of the motion to reopen. Lincoln Coal Co. v. Watts, 275 Ky. 130, 120 S.W.2d 1026 (Ky. 1938); Rex Coal Co. V. Campbell, 213 Ky. 636, 281 S.W. 1039 (Ky. 1926). KRS 342.0011(14) defines the term “compensation” as being “all payments made under the provisions of this chapter

representing the sum of income benefits and medical and related benefits.” Like permanent partial and permanent total disability benefits, TTD benefits replace lost income and, therefore, are income benefits. In other words, TTD benefits are a form of compensation.

The claimant’s award was the product of a settlement agreement. Even settled awards of workers’ compensation benefits are subject to the principles of the finality of judgments. See Beale v. Faultless Hardware, 837 S.W.2d 893 (Ky. 1992). They establish limits on both a worker’s entitlement and a defendant’s liability. The agreement in the present case did not include a buyout of future medical benefits or the right to reopen. Nor did it contain a provision requiring the employer to pay for post-award knee surgery or related TTD benefits.

KRS 342.125 permits an otherwise final award to be reopened and additional compensation to be awarded if the worker experiences a subsequent change of disability, but it imposes a number of conditions. KRS 342.125(7) provides that no statement contained in a settlement agreement regarding the employer’s liability, the nature and extent of disability, “or any other matter” is binding at reopening. It also provides that the parties to a settled award may raise any issue that could have been raised upon the initial application.¹ KRS 342.125(3) permits a reopening to obtain post-award TTD or to determine the compensability of medical expenses at any time during the period of the award, but KRS 342.125(4) is unambiguous in requiring a change in the amount of compensation set forth in an award or order to be prospective, from the date of the motion to reopen. An order of TTD benefits at reopening is a change in the

¹ In this case, the settlement provided that the claimant’s permanent disability was 45%. The ALJ determined, however, that his actual permanent disability had been 75% when he settled and that it remained 75% at reopening.

amount of compensation previously awarded; therefore, KRS 342.125(4) requires it to be prospective.

KRS 342.040(1) and (2) are general. They concern an employer's obligation to pay income benefits or to notify the Department of its refusal to do so and impose a penalty for refusing or delaying the payment of TTD without a reasonable foundation. KRS 342.125(4) is a specific statute regarding the conditions for modifying an otherwise final award of income benefits. Where two statutes address the same or similar subject matter, one in a broad way and the other specifically, the specific statute prevails. Boyd v. C & H Transportation Company, 902 S.W.2d 823 (Ky. 1995); Land v. Newsome, 614 S.W.2d 948 (Ky. 1981).

At issue in this appeal is the date for awarding TTD benefits at reopening; therefore, we are not persuaded by arguments that are based on the definition of TTD or on KRS 342.040. Nor are we persuaded that KRS 342.125(4) operates to circumvent KRS 342.267 and the Unfair Claims Settlement Practices Act, which penalize an employer for failing to make a good faith effort to settle a claim if the employer's liability is reasonably clear but do not oblige an employer to pay any particular benefits. Mindful that this case involves a post-award period of TTD following an elective surgery, we fail to see the alleged hardship in filing a prospective motion to reopen in order to ensure that the procedure would be compensable and that income benefits would be permitted from the onset of TTD.

The decision of the Court of Appeals is affirmed.

All concur.

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