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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: October 20, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-0997-WC

DATE 11-10-05 ElA Grouse PL

BOBBY ADAMS — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2004-CA-1419-WC
WORKERS' COMPENSATION BOARD NO. 02-0576

COASTAL COAL COMPANY; HON. J. LANDON OVERFIELD, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In a decision that was affirmed by the Workers' Compensation Board (Board) and the Court of Appeals, an Administrative Law Judge (ALJ) based the claimant's partial disability award on a lumbar impairment that was determined under the Fifth Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (Guides), using the Diagnostic Related Estimates (DRE) Model. Appealing, the claimant asserts that the Guides require impairment to be measured under the Range of Motion (ROM) Model for conditions such as his. He also asserts that the employer is not entitled to credit for the overpayment of voluntary benefits. We affirm.

The claimant was born in 1951, graduated from high school, and became certified as a mine electrician. He worked for the defendant-employer as a mine electrician and repairman. On October 9, 2001, he injured his back while pulling on a shuttle car cable. The employer's insurance carrier referred him to Dr. Bean, a

Lexington neurosurgeon, who prescribed physical therapy, ordered diagnostic studies, and referred him back to his family physician, Dr. Collins. The employer paid voluntary temporary total disability (TTD) benefits from October 9, 2001, through January 27, 2002. The claimant did not return to work after the injury, and on April 25, 2002, the claimant filed an application for benefits based upon the back injury and resulting psychological overlay.

Dr. Collins' report noted that radiological studies performed after the injury revealed a possible fracture of the L5 vertebra and significant degenerative changes at L4-5 and L5-S1; a hairline fracture of the L2 vertebra with slight compression; and degenerative changes at C5-6 and C6-7. When deposed, he stated that he had had little to do with treating the claimant's back injury except to perform follow-up examinations and prescribe medication. Most of the claimant's treatment was performed by the physicians to whom the workers' compensation carrier sent him, including Dr. Bean. In Dr. Collins' opinion, the claimant had a degenerative condition that was complicated by the work-related injury. Although he had no symptoms before the injury, he had developed chronic, unrelenting pain.

Dr. Bean examined the claimant and determined from a CT scan that there was a degenerative disc with herniation at L4-5 that produced moderate stenosis; degenerative changes at C5-6 and C6-7; and significant degenerative changes at L5-S1 without evidence of herniation. He diagnosed a lumbar sprain. A subsequent MRI revealed, however, that the claimant did not have a herniated disc and that although there was a bulge at L4-5, it did not appear to be causing a pinched nerve. It also revealed that there were some degenerative changes at L1-2, but most were found at L4-5 and L5-S1. Dr. Bean stated that the claimant reached maximum medical

improvement (MMI) on January 14, 2002. Using the Fifth Edition of the Guides, he assigned a 5% AMA impairment under DRE Category II based on pain that had persisted for a longer amount of time than would be normal for a sprain. He thought that the degenerative condition was pre-existing and dormant until aroused by the work-related injury and that the pre-existing condition accounted for half of the impairment.

Asked about the fractures to which Dr. Collins referred, Dr. Bean testified that it was common for a slope in the front of a vertebral body to be interpreted as a fracture. Although there were degenerative changes at L2-3, in the L3 vertebra, and at L4-5, his opinion was that there was no fracture at L2 or L5. He also noted that the claimant did not have radiculopathy or an unstable motion segment. He stated that he found no multi-level involvement of the lumbar spine as in multiple fractures, herniations, or bulges and that he did not find it appropriate to use the ROM Model to assess the claimant's impairment. He also acknowledged subsequently that it was not his practice to use the ROM Model when assigning impairment. He explained that, in his opinion, the model was an inaccurate and unreliable measure of impairment because it was based on the patient's voluntary effort rather than objective findings.

Dr. Templin, a specialist in occupational medicine and pain management, examined the claimant at the request of counsel and prepared a report. He reviewed the medical records and the CT and MRI reports but not the actual scan or film. Dr. Templin diagnosed chronic low back pain syndrome; degenerative lumbar and cervical disc disease; a focal annular disc bulge at L4-5 and L5-S1; chronic cervical pain syndrome; and a cervical disc bulge at C5-6 and C6-7. He stated that the cause of all of the conditions was the work-related injury. Using the Fifth Edition of the Guides, he assigned a 5% DRE Category II lumbar impairment, based upon the injury and an

asymmetrical loss of range of motion; a 5% DRE Category II cervical impairment, based on an asymmetrical loss of range of motion and non-verifiable radicular complaints; a 5% impairment for a compression fracture at L2, which was based upon the reports of CT and MRI scans; and a 3% impairment for moderate pain, which yielded a combined AMA impairment of 17%.

When deposed, Dr. Templin explained that the impairment for the L2 compression fracture was based on the MRI report which referred to a "previous hairline fracture" and acknowledged that causation would depend on whether the fracture occurred before the work-related injury. He also acknowledged that if Dr. Bean were correct in his impression that there was a pseudo fracture rather than an actual one, a 5% impairment for the condition would be inappropriate. Asked to rate the claimant under the ROM Model, Dr. Templin assigned a 28% impairment for loss of cervical and lumbar range of motion or a 32% impairment if the L2 fracture were included. Asked whether it would be more appropriate to use the ROM Model than the DRE Model when there are fractures at multiple levels, disk herniations, or stenosis or when there are a fracture and herniation, he responded that it would. He admitted, however, that he used the DRE Model when preparing the Form 107 report. When asked why he changed his mind, he replied that the question was asked, that it was an appropriate question, and that he responded to the question. He explained that use of the ROM Model was warranted if there were two different conditions within the same level, i.e., a compression fracture and degenerative disk disease.

Dr. Travis, a neurosurgeon, examined the claimant and reviewed extensive medical records as well as the MRI films. He noted that the claimant's voluntary range of motion was minimal but that, when distracted, he could rotate his neck 90 degrees in

each direction and put his chin on his chest. He had a non-dermatomal response to pinprick, but his reflexes were normal. Asked to walk across the room, he claimed an inability to sustain weight on his heels and had difficulty sustaining weight on his toes. Yet, when walking out of the building and using a cane, he had completely normal dorsal and plantar flexion, a normal gait, and he sustained weight on his heels. He noted that there were no objective findings on the neurological examination. Using the Fifth Edition of the Guides, he determined that the claimant came within DRE cervical Category I (0% impairment) and DRE lumbar Category II (5% impairment) for neuroforaminal compromise due to degenerative disc disease, which was totally pre-existing. He found no evidence of a compression fracture and no evidence of an acute disc or other signs of a significant acute injury.

The parties limited the contested issues to the extent and duration of disability and the claimant's entitlement to vocational rehabilitation. At the February 26, 2003, hearing and oral arguments, the claimant testified that he thought there was little work he could do. He relied on his vocational expert and argued that he was permanently and totally disabled. In the alternative, he asserted that the AMA Guides required use of the ROM Model for injuries that affected multiple levels of the spine; therefore, the ALJ must rely on Dr. Templin in awarding a partial disability because he was the only physician to assign a ROM impairment. The employer maintained that the claimant was able to perform work other than coal mining.

The ALJ asked whether the claimant would be willing to attempt vocational rehabilitation to which he responded affirmatively. The ALJ then asked the employer whether it would reinstate TTD while the claimant underwent a vocational rehabilitation evaluation by the Department of Workers' Claims and for which the employer would

pay. The employer responded affirmatively. On March 14, 2003, the ALJ entered an order in which the claimant agreed to undergo a rehabilitation evaluation through the Department, and the employer agreed to reinstate TTD benefits from January 27, 2002, pending further orders or action of the ALJ. The claim was then placed in abeyance, after which the claimant underwent two evaluations.

In support of the psychological portion of the claim, the claimant introduced evidence from Drs. Phil Pack and Eric Johnson, both of whom are psychologists. Their reports indicated that the claimant graduated from high school with average grades, completed 130 hours of Mines and Minerals electronic training. Their testing revealed a high-school to post-high-school reading ability and an eighth-grade ability in mathematics. Dr. Crystal, the employer's vocational expert, reported similar findings. Yet, in the April 2, 2003, evaluation, the claimant exhibited an ability to read at the sixth-grade level, language skills at the third-grade level, and arithmetic skills at the fourth-grade level, leading the evaluator to determine that rehabilitation was inappropriate. Moving for a second evaluation, the employer maintained that the results of the first evaluation were invalid due to a sub-maximal effort on the claimant's part. The ALJ granted the motion, and a second evaluation was performed on May 12, 2003, at which time his performance was found to be sufficient to access training programs at the community and technical college level. Although the claimant began a public speaking class and adequately performed his assignments, he stated that back pain caused him to withdraw before completing it.

On January 29, 2004, the ALJ awarded TTD from October 10, 2001, through January 14, 2002, followed by 425 weeks of permanent partial disability benefits. The employer received credit "for any amounts of compensation heretofore paid." Based on

the testimonies of Drs. Bean and Travis, the ALJ found no impairment due to a cervical spine injury and determined that there were no lumbar compression fractures. Relying on Dr. Bean, the ALJ determined that the claimant's injury caused a 5% impairment to the lumbar spine and noted that Dr. Templin also rated the lumbar injury in DRE Category II when preparing his report. The ALJ also determined that the claimant had a 10% impairment due to depression that resulted from his injury; that he did not retain the physical capacity to return to the work he was performing at the time of injury; and that he was 50 years old when he was injured. As a result, the claimant received a partial disability benefit that was based on a 15% impairment and multiplied by 3.2. KRS 342.730(1)(b), (c)1 and (c)3. Based on his performance in the vocational rehabilitation evaluation, which the ALJ noted was actually performed "through my insistence at the hearing," the ALJ concluded that he had no interest in rehabilitation and ordered no further benefits.

Among other things, the claimant's petition for reconsideration requested additional findings regarding why Dr. Bean's testimony concerning impairment was chosen rather than Dr. Templin's. Relying on Triangle Insulation and Sheet Metal Co. v. Stratemeyer, 782 S.W.2d 628 (Ky. 1990), he also asserted that the employer should not receive credit for the voluntary overpayment of TTD or, in the alternative, that the ALJ should order TTD through the date of the opinion, as voluntarily paid by the employer. The petition was denied, after which the claimant appealed.

Impairment

Contrary to the claimant's assertion, we are not convinced that these facts compelled the ALJ to rely on an impairment that was assigned under the ROM Model. Addressing impairment to the spine, page 379 of the Fifth Edition of the Guides, Section

15.2, states that "[t]he DRE method is the principal methodology used to evaluate an individual who has had a distinct injury." See also, Id. at 374. Pages 379-80 list five types of situations in which the ROM method is used. Of these, the claimant focuses on items 2 and 4, which state as follows:

> 2. When there is multilevel involvement in the same spinal region (eg [sic], fractures at multiple levels, disk herniations, or stenosis with radiculopathy at multiple level[s] or bilaterally).
> . . .
>
> 4. Where there is recurrent radiculopathy caused by a new (recurrent) disk herniation or a recurrent injury in the same spinal region.

He also focuses on page 380, Section 15.2a, which summarizes the procedure for determining whether an individual has multi-level involvement that warrants use of the ROM Model as follows:

> 4. Determine whether the individual has multi-level involvement or multiple recurrences/occasions within the same region of the spine. Use the ROM method if:
> a. there are fractures at more than one level in a spinal region,
> b. there is radiculopathy bilaterally or at multiple levels in the same spinal region,
> c. there is multi-level motion segment alteration (such as multi-level fusion) in the same spinal region, or
> d. there is recurrent disk herniation or stenosis with radiculopathy at the same or a different level in the same spinal region; in this case, combine the ratings using the ROM method.

Dr. Templin assigned a DRE impairment when completing his report. When deposed, he stated that the presence of a compression fracture and degenerative disc disease within the same level would warrant the use of the ROM Model in this case and that the claimant's ROM impairment would be 28%, or it would be 32% if the compression fracture were considered. In contrast, Dr. Bean was convinced that there was no compression fracture. He also stated that there was no disc herniation, radiculopathy, or unstable motion segment and no multi-level involvement of the lumbar

spine such as multiple fractures, herniations, or bulges; therefore, he thought it was inappropriate to use the ROM Model to assess the claimant's impairment.

Although medical evidence is required to establish the amount of AMA impairment that an injury causes, it is for the ALJ to determine which medical evidence is most persuasive. KRS 342.285; Kentucky River Enterprises v. Elkins, 107 S.W.3d 206, 210 (Ky. 2003). In doing so, the ALJ is free to consult the Guides. Confronted with what amounted to a difference of medical opinions regarding the nature of the claimant's condition and the proper application of the Guides, the ALJ found Dr. Bean's testimony to be more persuasive than Dr. Templin's. When preparing their written reports, Drs. Bean, Templin, and Travis all assigned a 5% lumbar impairment using the DRE Method. Although Dr. Templin testified subsequently that the ROM method was more appropriate, testimony from Drs. Bean and Travis that there were no compression fractures negated the basis for the opinion. Although Dr. Bean stated that it was not his practice to use the ROM Method and that the claimant had problems at multiple levels of his lumbar spine, it is clear from his testimony that he found none of the conditions that Section 15.a specifies for use of the ROM Method. Furthermore, there was no evidence that the Guides require the use of the ROM Method where there are multi-level degenerative changes such as he found. Substantial evidence supported the finding that Dr. Bean's use of the DRE Model was justified and the decision to rely upon it. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Credit for TTD

The claimant's second argument is that the employer is not entitled to receive credit for the TTD benefits that it paid after January 14, 2002. He also argues that the partial disability award should begin with the last TTD payment rather than the date of

MMI, although he offers no authority for the proposition. His rationale for precluding a credit is that the employer paid TTD voluntarily rather than under an ALJ's order and that Triangle Insulation v. Stratemeyer, supra, prohibits a credit for the overpayment of TTD against future benefits. He also asserts that the employer failed to request a credit for the overpayment of TTD at any time prior to the award.

The BRC memorandum lists extent and duration of disability and vocational rehabilitation as being contested issues, and nothing in the subsequent agreed order indicated that they were not. Therefore, questions regarding the duration of TTD and the extent of any permanent disability remained at issue when the claim was submitted for a decision. KRS 342.730(1)(a) and KRS 342.0011(11)(a) authorize TTD benefits until a worker reaches MMI, at which point any residual disability is viewed as being permanent. Permanent partial disability begins when a worker has a permanent disability rating (i.e., a permanent impairment) but retains the ability to work. KRS 342.0011(11)(b); KRS 342.0011(34)-(36). Nothing in Chapter 342 permits permanent partial disability benefits to begin on the date that voluntary TTD payments cease unless that date coincides with the date of MMI. It is no longer disputed that the claimant reached MMI on January 14, 2002; therefore, the ALJ properly ordered TTD benefits through that date and permanent partial disability benefits thereafter. As a result, the claimant received TTD beginning on January 15, 2002, that overlapped the period of his permanent partial disability award. In essence, he asserts that he is entitled to both TTD and partial disability benefits for the overlapping weeks. We disagree.

Nothing in Chapter 342 entitles a worker to receive benefits for more than total disability, and assertions that the employer was required to request a credit for the overpayment of TTD are not convincing. As stated in Williams v. Eastern Coal Co.,

952 S.W.2d 696, 699 (Ky. 1997):

> Virtually every workers' compensation award contains standard language awarding the employer "credit for any payments of compensation heretofore paid." "Compensation" means income benefits and medical payments made pursuant to the provisions of the workers' compensation act. KRS 342.0011(14). Thus, credit against an award has always been allowed for voluntary payments of workers' compensation income benefits paid prior to the rendition of the award. E.g., Western Casualty and Surety Co. v. Adkins, Ky. App. 619 S.W.2d 502 (1981); Cottrell v. Alton Box Board Co., Ky. App., 510 S.W.2d 19 (1974); American Radiator & Standard Sanitary Corp v. Crawford, 310 Ky. 711, 221 S.W.2d 684 (1949). This simply recognizes that the employer has pre-paid a portion of the benefits subsequently awarded to the injured worker, and that otherwise there would be a disincentive for the employer to voluntarily provide benefits needed by the employee during the pendency of the litigation. . . . The only debate in this regard has been whether the credit should be allowed on a dollar-for-dollar basis or only on a week-for-week basis. E.g., Triangle Insulation and Sheet Metal Co. v. Stratemeyer, Ky., 782 S.W.2d 628 (1990); General Electric Corp. v. Morris, Ky., 670 S.W.2d 854 (1984).

Contrary to what the claimant's citation to Williams v. Eastern Coal Co., supra, would imply, this is not a case in which an employer is attempting to credit a private benefit against a statutory benefit. Both permanent partial disability and TTD are statutory benefits. The decisions regarding credit for the overpayment of TTD indicate that a credit is permitted to the extent that future periodic payments are not affected.

In Cottrell v. Alton Box Board Co., supra, the employer was given credit against a partial disability award for the weeks in which it voluntarily paid TTD benefits, i.e., a week-for-week credit. The employer also paid voluntary TTD in Western Casualty & Surety v. Adkins, supra, but it was later determined that the worker was permanently and totally disabled from the outset, that only half of the disability was compensable, and that the employer and Special Fund were equally liable for income benefits. The award permitted the employer to take credit for any compensation it had paid. At the time, KRS 342.120 required an employer to pay all income benefits until it paid its entire liability for

the award and required the Special Fund to pay all benefits thereafter. The employer calculated its liability for Adkins' lifetime award, deducted its voluntary payments, and paid him the remainder in a lump sum rather than periodic payments. Adkins sought to limit the employer to a week-for-week credit, but the court allowed a dollar-for-dollar credit explaining that to do otherwise under the circumstances would discourage voluntary payments.

Subsequently, in General Electric Co. v. Morris, 670 S.W.2d 854 (Ky. 1984), and in W. T. Sistrunk & Company v. Kells, 706 S.W.2d 417, 419 (Ky. App. 1986), the employers sought a dollar-for-dollar credit against their liability for partial disability awards but were permitted to receive only a week-for-week credit under the rationale that to permit a greater credit would deprive the workers of future periodic payments. Again, in Triangle Insulation v. Stratemeyer, supra, the employer sought a dollar-for-dollar credit against a partial disability award; however, its overpayment of TTD could be credited entirely against past-due benefits, leaving the worker's future benefits intact. Noting that Western Casualty & Surety v. Adkins, supra, was not inapplicable simply because it involved a total disability award, the court determined that "an overpayment which can be credited fully against a past due amount without affecting future benefits is within the purview of the statutes." Id., 782 S.W.2d at 629-30.

The decision of the Court of Appeals is affirmed.

All concur.

COUNSEL FOR APPELLANT:

Thomas W. Moak
Stumbo, Moak & Nunnery
P.O. Box 511
Prestonsburg, KY 41653

COUNSEL FOR APPELLEE:

Thomas Clarke Donkin
World Trade Ctr., Ste. 1100
333 W. Vine Street
Lexington, KY 40507