

IMPORTANT NOTICE **NOT TO BE PUBLISHED OPINION**

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: May 24, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2006-SC-000696-WC

DATE 6/14/07 E. A. G. [Signature]

JAMES MCCAULEY, JR.

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2006-CA-000141-WC
WORKERS' COMPENSATION NO. 02-67064

PPG INDUSTRIES, D/B/A
PORTER PAINTS,
HON. HOWARD E. FRASIER,
ADMINISTRATIVE LAW JUDGE AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) found that the claimant failed to meet his burden of proving his entitlement to future medical benefits based on medical evidence that his work-related hand injury had healed and the absence of any medical evidence that it caused a permanent harm or would require additional treatment. The Workers' Compensation Board and the Court of Appeals affirmed, and the claimant appeals. Because we are not convinced that the ALJ erroneously shifted the burden of proof or that the absence of a medical opinion indicating that the claimant reached maximum medical improvement (MMI) compelled an award, we affirm.

The claimant sustained a work-related injury to his right hand and thumb on October 29, 2002. His employer paid voluntary temporary total disability during the

three weeks that he missed work and \$508.23 in medical benefits. The claimant returned to work on November 19, 2002, and progressed from light to regular duty over two or three weeks. He continued to work until August 1, 2003, when he was terminated for reasons unrelated to the injury.

Among other things, the parties stipulated to a work-related injury, notice, and the claimant's physical capacity to return to the work that he performed at the time of injury. The sole matter at issue concerned his entitlement to future medical benefits.

The claimant testified that Occupational Physician Services (OPS) provided the only medical care for his injury. He stated that the soft, fleshy part of his thumb remained inflamed and tender. It bothered him in cold weather or when he attempted to grab something with his right hand. He stated that it interfered with his ability to engage in high-level tournament fishing, use spray nozzles on hoses, peel potatoes, grab a coffee cup handle, and fire a pistol.

The medical evidence consisted of records from OPS. They indicated that the claimant had pinched his thumb between a safety bar and a piece of steel plate. X-rays revealed no evidence of an acute fracture, dislocation, or joint damage. The latest progress note, from November 18, 2002, indicated that the injury was well healed and that the claimant required Vitamin E. The claimant mentioned the thumb injury to his family doctor subsequently, when seeking treatment for an unrelated condition, but nothing indicated that the doctor treated it.

In a decision rendered on August 31, 2005, the ALJ noted that it was the claimant's burden to prove every element of his claim. Yet, he failed to submit any medical evidence that the injury had not reached MMI, that he had a permanent impairment rating, or that he might need any future medical care for the injury. The ALJ

noted that the claimant relied on the absence of a medical opinion that he had reached MMI to argue his entitlement to future medical benefits but was not convinced that an employer must produce such evidence where there is no medical evidence "showing any continuing need for medical treatment or permanent impairment." In any event, the ALJ found the November 18, 2002, treatment note and the absence of any subsequent medical treatment to be sufficient under the circumstances to show that the claimant had reached MMI. Noting that he suffered only a soft tissue injury that had healed and that he had required no medical treatment for 2 ½ years thereafter, the ALJ was not convinced that he proved any permanent "disability" to justify an award of future medical benefits.

KRS 342.020(1) entitles an injured worker to reasonable and necessary medical treatment at the time of the injury and thereafter "during disability." We determined in FEI Installation, Inc v. Williams, 214 S.W.3d 313 (Ky. 2007), that disability exists for the purposes of KRS 342.020(1) so long as a work-related injury causes impairment, regardless of whether the impairment rises to a level that it warrants a permanent impairment rating, permanent disability rating, or permanent income benefits. The Fifth Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment, page 2, defines impairment as being "a loss, loss of use, or derangement of any body part, organ system, or organ function." We noted, therefore, that impairment may or may not be permanent or rise to the level that warrants a permanent impairment rating. Viewed in terms of KRS 342.0011(1), objective medical findings of impairment demonstrate that a harmful change in the human organism has occurred. Under Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), a harmful change that no longer exists when a claim is decided does not compel an award of

future medical benefits.

It was undisputed that the claimant sustained a work-related injury. There was no medical evidence that the injury caused disability that warranted permanent income benefits (i.e., a permanent impairment rating); however, KRS 342.020(1) authorizes medical benefits "during disability" without regard to whether impairment rises to a level that warrants a permanent impairment rating. Therefore, as the party seeking future medical benefits, the claimant had the burden to produce medical evidence that his injury continued to cause impairment. That burden could not be satisfied by the mere absence of a medical opinion that he had reached MMI. Nor could it be satisfied with his own testimony regarding his present condition and limitations, for he was not a medical expert. Because the claimant failed to offer medical evidence of continued impairment, the ALJ did not err in finding that he failed to meet his burden of proof or dismissing his claim.

The decision of the Court of Appeals is affirmed.

All concur.

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